Contractor Personnel in the Federal Workplace: Confronting the Challenges

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ETHICS ISSUES IN GOVERNMENT-CONTRACTOR TEAMBUILDING

Introduction

The Department of Defense (DoD) has been engaged in an ongoing effort to incorporate the best business practices of the private sector into DoD and its components. One practice, establishing teams consisting of DoD and contractor employees, has become increasingly common. In addition, some DoD functions are being studied under OMB Circular A-76 to determine whether they should be considered for possible contracting-out to the private sector. Because of these efforts, a closer working relationship between the Government and the private sector has developed. As these new ways of doing business evolve, the line between Government and contractor responsibilities is less clear to many employees. There are no recognized exceptions to ethics laws or regulations for Government and private sector employees who work together on teams.

In Spring 1998, the DoD Standards of Conduct Office created a DoD task force to study the application of these laws and regulations to these initiatives. This memorandum, which highlights the issues that may arise in an environment where Government employees and contractors work closely together, is the first product of this task force. It provides general guidance through the use of examples. In the future, the task force expects to publish frequently asked questions and answers and more specific guidance in increasingly complex areas relating to the application of the standards of conduct to the closer working relationship with the private sector.

DoD personnel should be made aware of the statutory and regulatory restrictions that they face concerning numerous standards of conduct issues. Equally, contractors need to be aware of the statutory and regulatory restrictions that are imposed on Government employees.

This memorandum begins with a general discussion of Integrated Product Teams (IPTs). This section addresses the structure of these teams, which are the basis of many DoD initiatives. It then generally discusses the various subject areas of the chapters of the DoD Joint Ethics Regulation (JER). These sections are:

In each of these sections, there is a general discussion, a statement of the rules for DoD employees, and illustrative examples. This guidance is not a substitute for ethics and legal advice. Employees should contact their local ethics counselor for specific advice about their particular situation.

Before discussing the substantive areas stated above, we have included a section on Integrated Product Teams (IPTs). This section discusses the framework within which many Government personnel and contractors will be working together. In many instances, the way that these teams are formed and the functions that are performed must be carefully studied by agency officials. Because these matters set the stage for the ethics issues discussed below, we have included this information at the beginning of the memorandum.

Integrated Product Teams (IPTs)

General Rule: Government IPTs are to be used in virtually every stage of the acquisition process.

The Secretary of Defense has directed the adoption within the DoD of a concept used in industry called Integrated Product Teams (IPTs) to conduct as many acquisition functions as possible, including oversight and review of programs. IPTs are to function in the spirit of teamwork to provide advice and assistance on acquisitions and are composed of representatives from all appropriate disciplines working together to build successful programs and to enable the decision makers to make the right decisions at the right times. IPTs may be composed exclusively of DoD personnel or may include representatives of industry.

General Rule: When Government IPTs include representatives from organizations other than the Federal Government, employees must comply with the Federal Advisory Committee Act (FACA). The applicable references are: the GSA regulation (41 C.F.R. Subpart 101-6.10, Federal Advisory Committee Management) and the DoD Directive (DoDD 5105.4, Department of Defense Federal Advisory Management Program, 5 Sep 89).

For the purpose of FACA, the term "advisory committee" means "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof that is established or used by one or more agencies, in the interest of obtaining advice or recommendations for one or more agencies or officers of the Federal Government." A group is a FACA-covered committee when it is asked to render advice or recommendations as a group, rather than as a collection of individuals.

FACA is only an issue if the IPT includes non-Government personnel who are not in a contractual relationship with the Government. By its terms, FACA excludes any committee that is composed exclusively of full-time officers or employees of the Federal Government. There is an exception for non-Federal members of an IPT who have a contractual relationship with a Federal agency. Therefore, only contractors with which the agency already has a contract should provide individuals to serve on an IPT dealing with the system being developed, produced, or life-cycle supported. Generally, the requirement for a contractor to participate in an IPT should be set out in its contract, either as a separate Contract Line Item Number (CLIN) or as a task under a support contract. In addition, a separate, stand-alone contract could be appropriate.

Example 1: An Assistant Secretary identifies a need for an independent panel of experts to assess emerging technologies for incorporation into a new weapon design. This panel, if established by the Government, would be an

advisory committee under FACA if one or more members are not Government employees. The FACA would not apply, however, if a contractor established the panel. The contractor could hire a panel of experts to assess presentations by industry, select the best ones, and develop recommendations to present to DoD officials.

General Rule: IPTs must be constituted and function so that there are no organizational conflicts of interest.

An "organizational conflict of interest" (OCI) arises when a person is or may be unable to provide impartial assistance, the person's objectivity is or may be impaired, or the person has an unfair competitive advantage because of other activities or relationships with the Government. The Federal Acquisition Regulation (FAR Subpart 9.5) generally prohibits contract situations that give rise to OCIs.

An unfair competitive advantage also may arise where a contractor participates in an IPT that is reviewing or drafting technical requirements for the later acquisition. Generally, therefore, contractors should not be permitted to participate in IPTs that are responsible for developing contract requirements and specifications if they will compete for that effort. If a contractor must participate in IPTs that are responsible for developing contract requirements or specifications, then the Government must take steps to address the possible unfair competitive advantage. The Government could limit the contractor's ability to compete on that project in the future, or use several competing contractors to ensure a sufficiently wide cross-section of contractor participation.

If an IPT extends over a sufficient amount of time, these same concerns may arise in connection with the selection of a follow-on subsequent phase contract. The mere fact, however, that the incumbent contractor serves on the IPT generally should not preclude it from competing for these subsequent awards, so long as care is taken to ensure that the incumbent contractor is not afforded the opportunity to influence future requirements or is not provided access to more information than is necessary to perform its current contract.

Example 1: A university is a contractor member of an IPT established to oversee two DoD design contracts for unmanned vehicles. After one year, one of the contractors will be eliminated from further consideration. The university's contract should provide that it may not be a subcontractor to either contractor for any aspect of the unmanned vehicle contract.

General Rule: Members of IPTs may not improperly disclose or release proprietary or other business sensitive information.

The success of an IPT depends upon full and open communication, which necessarily requires that contractor members have access to most, if not all, information available to the Government members. Generally, Government employees are prohibited from releasing sensitive information on one contractor to another without that contractor's permission and appropriate non-disclosure agreements or provisions of the contract. In fact, the Trade Secrets Act imposes criminal penalties for improper release. As a guideline, information that is not releasable under the Freedom of Information Act (FOIA) is not releasable, including to a contractor participating in an IPT, unless specifically authorized by the owner of the information. Therefore, appropriate nondisclosure agreements should be executed. Similarly, if any

Government sensitive information will be used by the IPT, non-disclosure agreements barring the disclosure and use outside the IPT by the contractor also should be executed.

Example 1: An employee of the university in the above example may not disclose proprietary or business sensitive information of either contractor to anyone other than a Government employee who is authorized to receive it.

General Rule: IPTs should not perform inherently Governmental functions.

The functions of IPTs should be limited to advising program managers, contracting officers, and other Government officials. IPTs should not be empowered to take final action on any matter that is an inherently Governmental function, which is defined in FAR Part 7.5 as "a function that is so intimately related to the public interest as to mandate performance by Government employees. ... An inherently Governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government." Consult FAR Part 9.502 on organizational conflicts of interest.

The use of contractor employees on competitive source selection panels raises significant concerns about inherently Governmental functions. Therefore, IPTs should not participate in competitive source selections. This does not preclude the Government members from participating in source selection activities in their non-IPT capacities. Similarly, this does not preclude non-Government individuals from providing technical expertise and advice to Government evaluators, so long as they do not participate in the scoring or source selection decisions.

Example 1: In a competition between two Government contractors whose performance is monitored by an IPT composed of DoD and university employees, the university employees who possess expertise lacking in the Government may provide advice in evaluating the contractors' proposals. They will not, however, be allowed to score the proposals and should not attend source selection decision meetings.

General Rule: IPTs may not make changes to contract terms and conditions.

Only a contracting officer may make changes to contract terms, conditions, and requirements. Members of an IPT, whether government or contractor, do not have the authority to order contract changes nor direct a contractor in the performance of its contractual responsibilities. The IPT's role is limited to assisting the parties in understanding contract requirements, considering approaches and problems and facilitating timely resolution thereof. The contractor remains responsible for performing in accordance with the contract's terms and conditions. Recommendations developed by the IPT must be communicated to the contracting officer for consideration and possible contractual implementation.

Example 1: The IPT members attend a critical design review given by a development contractor. The IPT may not direct the development contractor to leave space in its design to include a technology that is not part of its contract statement of work; however, the IPT may make such a recommendation to the Government PM for implementation and incorporation into the contract by the PCO, if appropriate.

1. Conflicts of Interest

DoD employees who interact with contractor employees located at their work sites on a daily basis must be especially concerned with avoiding any actual or apparent conflicts of interest with their official duties in their dealings with these employees. Each situation should be reviewed on its own merits for compliance with the governing laws and regulations.

General rule: Employees are prohibited by criminal statute (18 U.S.C. 208(a)) from participating personally and substantially in an official capacity in certain matters in which they have a financial interest. The prohibition also applies when employees know that certain persons or entities have financial interests in the matters. These would include an employee's spouse, minor child, general partner, organization in which the employee serves as director, officer, employee, trustee or general partner, and a person with whom the employee is negotiating for or has an arrangement concerning prospective employment.

Further information regarding prospective employment may be found in the Job Hunting and Post-Government Employment section of this guidance.

Employees may participate in a particular matter when it does not have a direct and predictable effect on their financial interest.

Employees may work on matters involving specific parties if they own stock valued at no more than $5000 in one or more affected parties to the matter, based on a regulatory exemption at 5 C.F.R. 2640.202.

Example 1: A DoD employee inherits stock in a contractor valued at $15,000. The contractor is serving on an IPT and is one of the potential bidders on the next on-site support contract. Ownership of the stock constitutes a financial interest. Unless a waiver under 18 U.S.C. 208(b)(1) is granted, the DoD employee will be disqualified from participating in the selection of the successful contractor because the award of the contract would affect the company's earnings and the value of the stock.

Example 2: A personal relationship between a DoD employee and a contractor employee results in their marriage. The contractor employee will receive a bonus based upon the success of the contract being performed at the DoD worksite. The DoD employee could not participate in the evaluation of the contractor's performance.

Example 3: A contractor employee has been assigned to help DoD SSEB members evaluate proposals on an RFP for a new high-tech system. Her husband is the Vice President for Government Operations for one of the offerors. The conflict of interest laws and the Joint Ethics Regulation do not apply to contractor employees. However, the government has an interest in not allowing anyone to work on official matters if they have a conflict of interest concerning the matter. The contract should require disclosure and avoidance of potential conflicts. DoD should ask for disclosure of the financial interest of any contractor employee assigned to work that would require disclosure if performed by government employees. If the employee refuses to disclose her financial interests, ask the contractor to assign someone else who is willing to make the disclosure. If a conflict is discovered, ask the contractor to assign someone else to the project.

General Rule: Under 18 U.S.C. 205, Government employees are prohibited from personally acting as an agent or attorney for anyone else before a department, agency or court in connection with any covered matter in which the United States is a party or has a direct and substantial interest. A covered matter includes any judicial proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, or other particular matter.

Employees may represent spouses or minor children, and in some instances, nonprofit agency credit unions and on-site child care centers.

Example 1: The on-site contractor has a dispute with a DoD agency concerning contract performance. One of the contractor employees asks the DoD agency employee who is a member of the IPT to intercede with the contracting officer on behalf of the contractor. The DoD employee would be subject to criminal sanctions if she complies with the contractor's request.

Impartiality

Other situations, while not considered violations of the criminal conflict of interest statutes, may create a perception that an employee has lost impartiality in the performance of his or her official duties. It is a basic obligation of public service that employees shall act impartially and not give preferential treatment to any private organization or individual. Even the appearance of partiality or preferential treatment is a violation of the regulation on standards of conduct.

General Rule: DoD employees should not work on a matter if a reasonable person who is aware of the circumstances would question their ability to be impartial in the matter. Employees should consult with their supervisors and ethics counselors to assist them in resolving any question of perceived loss of impartiality. 5 C.F.R. 2635.502.

Example 1: A contractor employee resigns and accepts a job with the DoD. That employee should consult with the supervisor and ethics counselor to determine whether it would be appropriate to be involved in matters, including teams, affecting the former employer.

Example 2: A romantic relationship has developed between a DoD employee and a contractor employee. If the DoD employee has official duties that involve the work being performed by the contractor, there will be issues related to the appearance of a conflict of interest, as well as a perceived loss of impartiality. The result could be the disqualification of the DoD employee from participating in official matters that would affect the contractor.

2. Gifts

The standards of conduct rules on gifts fall into one of two categories: (1) gifts from outside sources; and (2) gifts between employees. When gift issues arise in the teaming setting, ethics counselors must apply the rules established for category (1) - gifts from outside sources - because DoD contractor personnel are *not* employees for purposes of the JER.

The gift rules are found in 5 C.F.R. 2635 Subpart B: *Gifts from Outside Sources* (JER sec 2-100). A brief summary of the rules follows:

General Rule: Except as provided in this subpart, an *employee* shall not, directly or indirectly, solicit or accept a *gift*:

(1) From a *prohibited source*, or

(2) Given because of the employee's *official position*.

An ***employee*** under JER sec. 1-211 is a DoD civilian employee, any active duty officer or enlisted member, any Reserve or Guard member on active duty orders, any faculty member or student of a DoD school, and certain foreign nationals. Note: The term does *not* include an employee of a contractor or subcontractor.

A ***gift*** under 5 C.F.R. 2635.203(b) is any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as training, transportation, local travel, lodgings and meals. It does not, however, include certain types of items (described further below).

A ***prohibited source*** under 5 C.F.R. 2635.203(d) is any person who: (1) seeks official action by the employee's agency, (2) does business or seeks to do business with the employee's agency, (3) conducts activities regulated by the employee's agency, (4) has interests that may be substantially affected by the performance or nonperformance of the employee's duties, or (5) is an organization, a majority of whose members are described in (1) through (4). The JER, section 1-207, provides that foreign governments or representatives of foreign governments that are engaged in selling to DoD or a DoD Component are defense contractors when acting in that context and so would be considered a prohibited source.

A gift is solicited or accepted because of the employee's ***official position*** if it is received from a person other than an employee and would not have been solicited, offered, or given had the employee not held the status, authority or duties associated with the Federal position.

Taken together, these definitions tell us that when an item qualifies as a gift, a contractor employee is considered a ***prohibited source*** for purposes of the gift rules. This means employees must not solicit gifts from contractor employees. They also may not accept unsolicited gifts from contractor employees unless specifically authorized under an exception to the gift restriction.

Example 1: As part of a project, a DoD employee and a contractor employee sit side-by-side in a DoD office. The contractor employee offers the DoD employee four complimentary box seat tickets (worth $25 each) to tomorrow's opening day baseball game. The DoD employee must refuse this offer because it is a gift offered by a prohibited source if no gift exception (discussed below) applies. (Although one exception allows acceptance of gifts valued at $20 or less, the employee may not pay the difference between $20 and the value of the gift.)

Example 2: The DoD employee's supervisor is getting married. He has been asked to take up an office collection for a wedding gift, suggesting that each employee donate $5.00 (if they want to). The DoD employee may not ask the contractor employee for $5.00 - this would be soliciting a gift from a prohibited source. The contractor employee could not give an *unsolicited*

gift of $5.00 toward the office gift because gifts of cash are never permitted.

The office is also having a little get-together Friday afternoon before the wedding. Each person attending has been asked to pay $3.00 to cover refreshments. The contractor employee may pay $3.00 cash because this is not a gift, but the market value of the cost of the refreshments.

General Rule: There are two ways an employee may accept something of value from an outside source: if the item does not qualify as a "gift;" or if the item falls under one of the gift exceptions.

The following items are not "gifts:"

(1) Modest items of food and refreshments offered other than as part of a meal;
(2) Greeting cards and items with little intrinsic value which are intended solely for presentation;
(3) Ordinary loans from financial institutions;
(4) Opportunities and benefits that are available to the general public or to a class of people (all Government employees, all active duty members, etc.);
(5) Rewards and prizes given to competitors in contests or events open to the public;
(6) Pensions and other benefits resulting from continued participation in employee welfare and benefit plans;
(7) Anything which is paid for by the Government or secured by Government contract;
(8) Any gift accepted by the Government under specific statutory authority; or
(9) Anything for which market value is paid by the employee.

In addition, under 5 C.F.R. 2635.204, there are 12 exceptions to the general rule that prohibits acceptance of gifts from outside sources or that are offered because of the employee's official position. The exceptions are:

(a) Gifts valued up to $20 (up to a maximum of $50 from the same source in one calendar year)
(b) Gifts based on a personal relationship
(c) Gifts that are certain discounts or similar benefits
(d) Gifts associated with public service awards and honorary degrees
(e) Gifts based on outside business/employment relations
(f) Gifts from political organizations
(g) Widely attended gatherings and other events
(h) Social invitations (from other than prohibited sources)
(i) Meals and entertainment in foreign areas
(j) Gifts to the President or Vice President
(k) Gifts permitted under Agency regulations
(l) Gifts accepted under statutory authority

Example 1: Non-gift: It's the DoD employee's birthday. The contractor employee, at the next desk, gives him a birthday card and a cupcake with a candle on top. The DoD employee may accept these items, even though the contractor employee is a prohibited source, because the card and the cupcake do not fall within the definition of "gifts" under 5 C.F.R. 2635.203(b).

Example 2: Personal Relationship: The contractor employee has been given four $25.00 tickets by his boss to tomorrow's baseball game. He offers the tickets to the DoD employee, who refuses because the contractor employee is a prohibited source. The contractor employee, however, contends that he is offering the tickets solely out of friendship. Although a personal relationship can justify the acceptance of a gift, the facts show that the contractor employee and the DoD employee have no history of prior friendship, seldom socialize outside the office, and have only worked together for six months. Also, the contractor provided the tickets. In this case, the gift does not satisfy the "personal relationship" exception under 5 C.F.R. 2635.204(b). Situations involving the exception for "personal relationships" are extremely fact specific. For that reason, cases involving this exception should be reviewed with the assistance of an ethics counselor.

Example 3: Gifts of $20 or Less: A DoD contractor shares an office with a DoD employee. On the employee's birthday, the contractor gives him a $15 box of candy. The employee may accept the gift because its value does not exceed $20. Note, however, that the employee may not accept more than $50 in gifts per calendar year from the contractor, including gifts from this employee and anyone else who works for the same contractor.

Example 4: Social invitation: A Government employee has invited several co-workers to his house for a party. One of the persons invited is a contractor employee who works in the same office. This is acceptable because the gift of food and beverages to the contractor does not violate any ethics rules. If, however, the contractor reciprocates by inviting the Government employee to her house for a party, the Government employee may not accept the invitation under this exception because it does not apply to invitations from a prohibited source. The Government employee may attend the event if one of the other gift exceptions applies, such as the exceptions for gifts not exceeding $20 or widely attended gatherings.

Example 5: Award: A DoD employee has been selected for an outstanding performance award for his contributions toward greater efficiency from the DoD contractor that employs his co-worker. In fact, the contractor employee nominated the DoD employee for the award. The award includes a bronze plaque and an all-expense paid trip to Hawaii. The DoD employee may not accept the trip to Hawaii. Under 5 C.F.R. 2635.204(d), an employee may accept gifts as part of a bona fide award given for meritorious public service, but only from a person who does not have interests that may be substantially affected by the performance of the employee's official duties. Here, the DoD employee's connection to the donor contractor is too close to permit acceptance of the award. However, the DoD employee may accept an award certificate and plaque from the contractor, since these items are excluded from the definition of a "gift."

Example 6: Discounts: A DoD employee exercises at a local health club, which offers a membership discount to all Federal employees. However, the contractor provides its employees with a free membership to a different health club, which is a much better facility. After hearing the DoD employee complain about her health club, the contractor employee tells her that he can get the DoD employee a "guest" membership rate for the same price that the DoD employee is paying for her current health club. The DoD employee would love to take advantage of this opportunity if she can. There is no exception, however, that covers a discount or benefit of this nature. While there is a gift exception for discounts and similar benefits under 5 C.F.R. 2635.204(c), such discounts must be offered to all employees or all uniformed

personnel. It does not apply to discounts that discriminate among employees or members based on rank or position. Further, this discount would only be available as a special favor to the DoD employee based upon her employment relationship with the contractor employee.

Example 7: Door Prize: The office where DoD and contractor employees work is having a holiday party. The contractor employee volunteers to have his employer donate a color television set as a door prize. He states that his employer donates items to charity all the time for good public relations. The contractor may not donate the television, or any other prize, to the office door prize. While DoD and the military departments may accept gifts from outside sources, gifts should not be accepted when they will raise a question of impropriety in light of the donor's present or prospective business relationship with the Agency. Therefore, the gift should be declined.

Example 8: Widely-Attended Gathering: DoD and contractor employees (and their spouses) have been offered free attendance at a dinner hosted by a large DoD contractor to celebrate the 50th Anniversary of the Department of Defense. Military members and civilian employees, civic leaders, and other business leaders have been invited to attend. The DoD employee and her husband may accept this gift if her supervisor determines that the event qualifies as a "widely attended gathering" and her attendance is in the agency's best interest. Because the sponsor of the dinner is an organization with interests that may be substantially affected by the DoD employee's duties, the supervisor must make this determination in writing. The DoD employee's supervisor does not determine whether the contractor employee may accept free attendance at the dinner. That determination is made by the contractor employee in consultation with the contractor's ethics department.

Example 9: Retirement Party: The DoD program manager has invited his employees to dinner at his house to celebrate his upcoming retirement. He has also invited the contractor employee, who brings a $22 bottle of wine. Although the program manager may accept gifts appropriate to the occasion from his subordinate employees, he may not accept the bottle of wine from the contractor because it is more than $20. However, knowing the discomfort this will cause, a solution is that he may accept the wine on behalf of everyone at the party if he serves it that evening. He may not, however, squirrel it away in his private stock.

General Rule: Even if an exception applies to a gift, an employee shall not:

(1) Accept a gift in return for being influenced in the performance of an official act;

(2) Solicit or coerce the offering of a gift; or

(3) Accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using his public office for private gain.

Example 1: A DoD employee has to review a written proposal submitted by his office-mate, a contractor employee. To sweeten the DoD employee's disposition toward his proposal, the contractor employee offers him a $19.95 box of fine chocolates. The contractor employee maintains that the candy can be accepted under the $20.00 *de minimus* exception. Although the $20.00 *de*

minimus exception will apply in many cases, the candy in this situation is an obvious attempt to influence the DoD employee in the performance of his duties. As 5 C.F.R. 2635.204 points out: "Even though acceptance of a gift may be permitted by one of the exceptions…it is never inappropriate and frequently prudent for an employee to decline a gift offered by a prohibited source or because of his official position." In this case, it may be prudent to decline the gift.

Example 2: A DoD employee is taking up a collection from among her co-workers for her supervisor's wedding gift. She knows she cannot solicit a donation from a contractor employee. As she passes by the contractor employee's desk, she casually mentions that it looks like the collection will be $19.95 short of the amount needed to buy the gift and any help toward reaching the goal will be greatly appreciated. The contractor employee immediately offers her a twenty-dollar bill. The DoD employee must give it back - this is a thinly veiled solicitation of a gift. In addition, this would be a gift of cash, which may not be accepted.

General Rule: A Government employee who receives a gift that cannot be accepted under the ethics rules must either:

(1) Return the item or pay the donor its fair market value;

(2) When it is not practical to return the item because it is perishable, the employee's supervisor or agency ethics official may direct the gift be given to an appropriate charity, shared within the office, or destroyed;

(3) For entertainment, favors, services, benefits or other intangible gifts, the recipient must pay the fair market value (subsequent reciprocation by the employee is not acceptable);

(4) Dispose of gifts from foreign governments or international organizations in accordance with 41 C.F.R. Part 101-49; handle gifts of official travel in accordance with 41 C.F.R. 101-35.103.

Example 1: A contractor employee has been given four $25.00 tickets by his employer to tomorrow's baseball game. She offers two of the tickets to a DoD employee, who refuses because it would constitute a gift from a prohibited source and no exception applies. The contractor employee then says that he will sell the DoD employee the two tickets for face value ($50.00). The DoD employee can buy the tickets as long as he pays the fair market value. If the tickets are difficult to obtain, the DoD employee should not make a regular practice of purchasing such tickets from the same source on a basis so frequent that a reasonable person would believe that the employee is using his public office for private gain.

Example 2: The week before Christmas, the contractor employee's company sends the DoD office where he works a case of Florida grapefruit (valued at $45). The office supervisor recognizes that this is an unacceptable gift, but that it also is too perishable to return. After consulting with his ethics counselor, the DoD supervisor gives the case of grapefruit to a local nursing home that is operated by a charitable organization.

Example 3: A DoD employee and his wife attend a movie premiere as the guests of a contractor employee, who received the tickets from his company. After the event, the DoD employee discovers that he should not have accepted the

gift because none of the gift exceptions applied. The DoD employee must now reimburse the contractor employee for the fair market value of both tickets.

3. Job Hunting and Post-Government Employment

All rules concerning job hunting and post-government employment apply to teaming.

Seeking Employment

General Rule: If DoD employees want to seek employment with a DoD contractor, they must not perform substantial work on any particular matter affecting the contractor without first seeking advice from an Ethics Counselor.

There are two statutes that apply to seeking employment. The first one, the Conflicts of Interest statute, applies to all DoD employees and prevents them from working, personally and substantially, on a matter that can affect a contractor if they are negotiating for employment with the contractor. 18 U.S.C. 208. The second one, the Procurement Integrity statute, applies only to DoD employees who are working, personally and substantially, on a procurement contract of $100,000, or greater. If these employees are seeking employment with any of the bidders or offerors, they must not work on the procurement and must report the employment contact. 41 U.S.C. 423.

Conflict of Interest, 18 U.S.C. 208 and 5 C.F.R. 2635.604:

If DoD employees immediately and clearly reject the possibility of employment, they may work on matters affecting the contractor.

If DoD employees do not immediately and clearly reject the possibility of employment, they may not perform any substantial work on any matters affecting the contractor. These employees must provide a written notice of disqualification to their supervisors. JER section 2-204(c).

If the matters are so central or critical to employees' duties that their work performance would be materially impaired if they had to stop working on them, employees may be allowed to take annual leave or leave without pay while seeking employment with the contractor. DoD Components may take appropriate administrative action if the employee is unable to perform the duties of his or her position.

If DoD employees have not worked on a matter that affects a contractor because they are seeking employment, and employment discussions end with no offer of future employment, or if 60 days have passed since they sent resumes to the contractor and no discussions have occurred, supervisors may decide if employees may then be assigned to such a matter.

When an employee starts negotiating for employment, only a waiver would allow the employee to perform substantial work on the matters. To grant a waiver, an agency appointing official must determine that the employee's interest in employment with the contractor, as well as the contractor's interest in the matter, are not "so substantial as to be deemed likely to affect the integrity of the [employee's] services." DoD recommends that ethics counselors and agency appointing officials carefully scrutinize the granting of waivers in the light of all the facts and circumstances.

Example 1: A contractor employee approaches a DoD employee who is working on a matter that affects the contractor and starts a discussion about the DoD employee coming to work for the contractor. If the DoD employee does not immediately and clearly reject the possibility of employment, the employee must stop working on the matter.

Example 2: A decision has been made to privatize a depot and the employees whose positions have been eliminated are forming a corporation to carry out the functions under contract with the Government. These employees are disqualified from performing substantial work on the privatization effort. Depending on the type of work, however, a regulatory exemption may apply, or the DoD Component may be able to grant a waiver that would allow the employee to work on the effort.

Procurement Integrity Statute, 41 U.S.C. 423 If DoD employees immediately and clearly reject the possibility of employment with a bidder or offeror, they may continue working on a procurement of $100,000, or greater, but they must still report the employment contact in writing to their supervisors and ethics counselors.

If they want to seek employment with the bidder or offeror, they must stop all "personal and substantial" work on the procurement. They must also provide a written notice of disqualification to the head of the contracting activity, with copies to the contracting officer, source selection authority, their immediate supervisor, and ethics counselor. If the procurement is a Broad Agency Announcement (BAA) or Small Business Innovative Research (SBIR), employees may seek a partial waiver from the head of the contracting activity. However, they must stop all "personal and substantial" work on the procurement until they get the waiver.

If DoD employees have not worked on the procurement because they are seeking employment, and employment discussions end with no offer of future employment, the head of the contracting activity may decide whether they may resume work on the procurement.

Post-Government Employment Rule 1: Former DoD employees may not represent anyone else, to any part of the Federal Government, except Congress, concerning a matter on which they worked or which was pending under their official responsibility during the last year of their Federal service. 18 U.S.C. 207. This rule does not apply to enlisted members.

Senior officials (paid at level 5 or above of the Senior Executive Service or military 0-7 and above) may not represent the contractor or anyone else to the DoD Component(s) in which they served in their last year of Government service regarding any matter (whether or not they worked on the matter or it was pending under their official responsibility) for one year. 18 U.S.C. 207(c).

If DoD employees who are not *senior officials* did not work on a matter "personally and substantially," and did not have the matter under their official responsibility during their last year of Government service, they have no employment restrictions regarding it under 18 U.S.C. 207.

If DoD employees worked on a matter "personally and substantially," they may work for anyone, including the contractor that worked on the matter, and they may even work on that same matter. They may not, however, represent

the contractor or anyone else to the Federal Government, except Congress, regarding the matter for as long as the matter lasts. 18 U.S.C. 207(a)(1).

If employees had a matter under their official responsibility during their last year in Government, even though they did not work personally and substantially on the matter, they may work for anyone, including the contractor that worked on that same matter. They may also work on that same matter. They may not, however, represent the contractor or anyone else to the Federal Government, except Congress, regarding the matter for two years. 18 U.S.C. 207(a)(2).

Example 1: A recent former *senior official* of DISA may contact a contractor employee working at DISA to discuss the interests of his client regarding a matter. He may not, however, contact the DISA employee sitting next to the contractor employee to discuss the same thing.

Example 2: A former DoD employee gets a job with a contractor and is working on the same matter that she worked on as a DoD employee. She attends a meeting between the contractor and the DoD at which other contractor employees are representing the interests of the contractor on that matter to the DoD employees. If the former DoD employee was a high level official or supervised the Government employees in attendance, she may be improperly appearing with the intent to influence the DoD employees. These situations depend on the facts and former employees are encouraged to seek guidance from Agency ethics counselors.

Rule 2: Certain DoD employees may not accept compensation for one year from the prime contractor of a contract of $10,000,000, or greater. 41 U.S.C. 423.

To be restricted, the employees must have held certain positions (procuring contracting officer, source selection authority, member of source selection evaluation board, chief of financial or technical evaluation team, program manager, deputy program manager, or administrative contracting officer), or personally made certain decisions involving $10,000,000, or greater, (decisions to award contracts, subcontracts, or modifications of contracts or subcontracts, or task or delivery orders; to establish overhead or other rates; to approve issuance of a contract payment; or to pay or settle a claim) regarding the contract.

The employees would be prohibited from accepting compensation from the contractor for a period of one year after the decision or service in the position. They may, however, accept compensation from "any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract."

4. Use of Government Resources

As a matter of policy, contractors are ordinarily required to furnish all property necessary to perform Government contracts. (Federal Acquisition Regulation (FAR), FAR 45.102) There are times, however, when the Government has unique property that it must provide to the contractor to accomplish the contract, it is cost effective, or it is otherwise in the Government's best interest to provide facilities and equipment. The Government may provide Government facilities and equipment to a contractor. The contract must

describe the property. The contractor is responsible and accountable for the property; and must establish and maintain a system to control and protect the property. The contractor's procedures must be in writing. They must also be adequate to assure that the Government property will be used only for those purposes authorized in the contract. (FAR 45.509-2)

Because the availability of Government property impacts the overall cost of the contract, and may impact the competitiveness of potential contractors, Government employees need to know what the contract says about Government facilities and equipment before providing any Government property to a contractor. If the contract was priced on the condition that the contractor would provide the necessary resources, then the Government may pay too much if it provides resources tasked to the contractor without renegotiating the contract price. It may also adversely impact the integrity of the procurement system. Companies may have decided not to compete based on a contract condition that they had to provide certain property. Only a Contracting Officer can make changes to the terms and conditions of a contract, so issues involving changes to property terms must be referred to the contracting officer for resolution.

General Rule: The contracting officer has ultimate responsibility for determining the proper use of Government property, but similar rules apply to contractor employees as to Government employees. The property can only be used for purposes authorized in the contract. The contract may permit use of Government property on a rental basis for other commercial work of the contractor, but the terms and conditions must be spelled out. Government property includes real and personal property in which the Government has any property interest, as well as any right or other intangible interest (including contractor services) purchased with Government funds. (5 C.F.R. 2635.704(b)(1))

Example 1: Use of Government Telephones: A contractor employee is working at a DoD office. The contract provides that the Government will provide office space, desks, computers, and telephones. She asks whether she can use the Government telephone to call her daughter at home. The JER does not apply to contractor employees (except for former DoD employees covered by the post employment sections). However, the contracting officers may permit contractor employees who have been provided phones under the contract to make the occasional local calls that are permissible for Government employees using Government telephones. (5 C.F.R. 2635.704)

Example 2: Contractor Use of Government Email: A contractor employee is supporting a DoD program. In order to facilitate communications, the contractor employee needs access to the agency email system. Contractor employees may use Government resources, including the email system, for official business when authorized to do so by the contracting officer or representative. Care must be taken when providing access to email systems so that access is not provided to non-public information without taking appropriate safeguards. For example, if the email contains access to Privacy Act information, the contractor employee's access to that information must be restricted or the contract must contain FAR Privacy Act clauses. If the email contains access to proprietary information belonging to other contractors, access must be restricted or the owners' consent is required to release the information. As a practical matter, contractor employees who use domain servers should have their employer's identification in their email address, *e.g.* **jjones.corp@hq.army.mil**.

Example 3: Advertising on Email: A contractor employee sends a message on the agency email system offering to sell two tickets to a sporting event. Contractors may not use agency resources in violation of any statute, regulation, rule or policy. Personal solicitation is restricted by policy on most agency email systems. However, the contractor employees could post a notice on a bulletin board in a common area for personal messages if authorized by agency policy.

Example 4: Use of Government Recreational Facilities: A contractor employee asks if she can use the base gymnasium during lunch. Occasionally, contractor employees ask to use the installation exchange store, golf course, gymnasiums, clubs, libraries and other facilities. Use of these facilities is governed by various statutes and regulations, and should be addressed in the contract. For example, it is not uncommon to provide access to the exchange store, gymnasium, library and limited legal assistance to contractors accompanying the Armed Forces outside the United States. The Government must be contractually obligated to provide this assistance as part of the logistics support in order to provide this access. Within the United States, contractors are not authorized to use the exchange stores, commissary, medical care or legal assistance, unless they have retired military or other status, which would provide independent authorization. (See 10 U.S.C. 1061-1065 (commissaries); 10 U.S.C. 1074-1099 (medical care); DoD Directive 1330.9 (exchanges); and DoD Directive 6060.2 (child care)). Contractor employees working on the installation may be authorized to use the installation restaurants, clubs, golf courses, gymnasiums, and other morale, welfare and recreation activities by the local installation commander on a space available basis.

Example 5: Awards to Contractors: A DoD facility has several successful research teams that include both contractor and DoD employees. The director wants to recognize all members of the teams. There are several issues, however, that must be considered. First, the Government does not supervise the contractor employees. Supervision would cause the relationship to become one of personal services. Personal services contracts are prohibited unless a statute provides specific authority (FAR 37.104). Personal services contracts also trigger certain rights and responsibilities, including payment of benefits, tax withholding and conflicts of interests statutes (FAR 37.104). Contractor employees receive their awards and performance incentives from their contract supervisor. Awards and performance incentives such as award fees and incentive payments may have been built into the contract. They may be paid as part of contract overhead costs. The Government cannot put itself in the position of managing or supervising contractor employees. In addition, there is no statutory authority to pay cash awards to contractor employees. The authority under which the Government pays cash awards to Federal civilian employees (5 U.S.C. 4501-4506, 4511-4513) or to military personnel (10 U.S.C. 1124-1125) does not apply to contractor employees.

There is authority, however, to provide honorary awards to contractor employees. These include certificates and other small items as provided in the agency's honorary awards program. These honorary awards are limited to occasions in which the contractor employees have significantly exceeded contract requirements. (DoD 1400.25-M, sec. O.2.b.) Also, all honorary awards must be coordinated in advance with the contracting officer. Prior coordination is required because the contracting officer may be taking action to correct deficiencies in the contractor's performance. The Government must communicate clearly and with one voice to enforce contract performance.

Example 6: Use of Contractor Employees for Morale and Welfare Events: The commander of a DoD installation is planning an organization day picnic and wants to solicit help from contractor employees to provide logistical support. Contractor employee time is a Government resource to the extent that the Government has contracted for the time. (5 C.F.R. 2635.704(b)(1)) This time can only be used for the purposes authorized by the contract. Contractor employees may assist in various morale and welfare or community activities sponsored by the Government if it is within the scope of the contract. For example, if the contract provides that the contractor will set up stands and bleachers for authorized ceremonies, then contractor employees working within the scope of their contract may perform the work and be paid. If a contract provides for painting, however, and DoD employees try to direct the contractor employees to set up the stands, then that work would be outside the scope of the contract. The contractor employees could not be paid for their efforts unless the contract was amended. Contractor employees should never be asked to work outside the scope of their contract because of possible claims and litigation. They may not agree to perform the work without charge unless it is accepted by appropriate authority as a gift to the Government.

Example 7: Inviting Contractor Employees to Morale and Welfare Events: An installation commander would like to invite contractor employees to attend a picnic for DoD personnel. The terms of the contract and the specific nature of the event must be considered, and the contracting officer and ethics counselor should be consulted. In general, while the Government may elect to pay contractor personnel for participation in training or dispute resolution discussions when required by the contract, the Government cannot pay the contractor for entertainment costs. (FAR 31.205-14) Reimbursement of contractor employee morale and welfare expenses is also limited. (FAR 31.205-13) The Government should be cautious about inviting contractor personnel to leave their place of employment for recreational events because it creates the expectation of payment. Even when the contractor knows that it will not be paid for services not delivered during the absence of its employees, the contractor may feel obligated to have its employees attend. Agencies may permit contractor personnel working on-site to attend morale and welfare events when the agency believes that it would enhance performance. However, the contractor personnel must make arrangements with their contractor supervisor for appropriate leave or other status under the contract. Care must also be taken neither to permit the contractor to subsidize the DoD event, which would be a gift from a prohibited source, nor to allow Government funds to pay for the morale and welfare of unauthorized persons.

Example 8: Safeguarding Proprietary Information: A DoD installation has a support contract in which the DoD provides access to Government technical databases to the contractor to facilitate contractor support. The contractor notes that the Government technical databases include proprietary information from competing contractors. The contractor may not use this information to enhance its competitive position. The Procurement Integrity Act (41 U.S.C. 423) restricts the release of source selection and contractor bid and proposal information; the Trade Secrets Act (18 U.S.C. 1905) makes it a crime to improperly release contractor trade secrets and other confidential information outside the Government; the Privacy Act (5 U.S.C. 552a) restricts release of personal information about individuals; and the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R. 2635.703) prohibits Government employees from using nonpublic information to further

private interests. In addition, when the Government purchases technical data and computer software, there are often restrictions on release. An improper release of technical data or computer software information could result in claims from the owner for breach of contract or loss of business. The Government must restrict access to the portions of the databases that contain proprietary information from other contractors unless it obtains their consent to the release. It also must restrict the contractor's use of this information in the contract. Finally, the Government may consider other steps to protect the competitive process, including limiting the contractor's ability to compete on future contracts.

Example 9: Contractor Employees as Timekeepers: Although contractor employees may not supervise DoD employees, they may serve as timekeepers, since timekeeping is a ministerial function of inputting time and leave approved by the DoD employees' supervisor. The timekeeper has access to information protected by the Privacy Act, such as social security numbers and other personal information. The DoD protects this information by putting the appropriate Privacy Act clauses in the contract. (FAR Part 24) The contractor employee can act as timekeeper with the appropriate contract clauses. The DoD supervisor must approve all leave and certify time for payment.

Example 10: Contractors at Sensitive Meetings: A DoD employee who briefs senior personnel regarding the status of pending contract negotiations asks if she may bring her technical advisor (a contractor employee) to the briefing. This is discouraged. If the contractor employee is present, however, care must be taken to ensure that the Procurement Integrity Act and the Trade Secrets Act are not violated. The DoD official must ensure that neither the technical advisor nor the employing company has an interest in the pending negotiations. She must obtain a non-disclosure agreement from the technical advisor and the employer. The solicitation should also inform prospective offerors of possible contractor involvement in the evaluation. It is critical to know the identity of the participants at any meeting in which sensitive DoD information will be discussed. The FAR generally requires all contractor employees attending meetings, answering DoD telephones and working in other situations in which their contractor status is not obvious to third parties, to identify themselves as contractor employees to avoid creating the impression that they are DoD employees. (FAR 37.114)

Example 11: Use of Nonpublic Information: A selection has been made for a $50 million agency contract. A DoD employee's friend works for the company that was not selected. The DoD employee may suggest to his friend to send a resume to the selected contractor after the public announcement has been made of the award, but not before that time. The DoD employee may not contact the selected contractor and recommend that the company hire his friend, as this is a misuse of position, discussed in the section immediately following.

Example 12: Insider Information: A DoD employee is aware that the DoD is about to purchase $1 million in ABC software for a database, and would like to buy ABC stock. He may not purchase ABC stock, nor may he recommend that his friends or relatives purchase stock in that company until the public announcement of the award.

Example 13: Protection of Proprietary Information: A DoD employee is asked to review the specifications for an agency requirement for computers. Since the DoD employee is temporarily stationed at the contractor's facility, he must

be cautious of who is given access to non-public information. Contractor support personnel, including those persons who operate the copier or fax, may not be authorized to have access to certain non-public information. The DoD employee must also secure the information when he leaves his work area, such as, by locking it in his desk or in a cabinet.

Example 14: Use of Government Vehicles: A DoD employee has a Government vehicle to transport the program team to a local meeting away from the team's duty station. The contractor employee requests and receives a ride. On the way back from the meeting, someone suggests a stop to join other agency and contractor personnel at a farewell lunch for a contractor employee. The restaurant is on the route. Under the travel regulations, contractor employees may be passengers in Government vehicles if the head of the DoD Component command or organization has given prior approval. Government vehicles may only be used for official purposes and may not be used to transport the team to an unofficial luncheon. The answer may differ if the individuals are on temporary duty status because these individuals may be authorized to use Government vehicles to obtain meals.

5. Misuse of Position and Endorsement

A. Use of Public Office for Private Gain In carrying out official duties, DoD employees must ensure that questions do not arise about actual or perceived benefits that they or someone they know receives as a result of their Government job.

General Rule: Government employees cannot use their Government position for their own private gain or for the private gain of relatives, friends, or other persons with whom they are affiliated in a non-Governmental capacity. Affiliated persons include prospective employers, business associates, and organizations to which they belong. They cannot use or permit the use of their Government title or authority in a manner intended to coerce or induce another, including a contractor, to provide a benefit to themselves, their friends or relatives, or another person with whom they are affiliated in a non-Governmental capacity. 5 C.F.R. 2635.702.

Example 1: A DoD employee's best friend is looking for a job. She has heard from contractor employees with whom she is working that the contractor has several openings in her friend's area of expertise. She can pass on public information about job openings with contractors to co-workers and friends, but she cannot request that a contractor interview or hire her friend.

Example 2: A DoD employee has just started work with DoD. When he left his private sector job, his former boss told him to let her know of any business opportunities at DoD. The DoD employee would like to help his former boss out. The DoD employee can pass on public information, but he cannot pass on information to his former employer about agency programs, possible contracts or other potential business opportunities based on nonpublic information.

Example 3: A DoD employee starts a consulting business. The contractor employee that she works with has a number of clients she thinks might hire her. The DoD employee would like to ask the contractor employee for some business leads. While she is a DoD employee, regardless of whether she intends to remain in her Government position or separate from Federal service, she cannot request information from the contractor to support her business. Requesting such information could be a conflicts of interest. She

may advertise her business generally; such as on a non-Government web site or in a publication. She cannot, however, write targeted solicitations to agency contractors that are affected by her duties. The DoD employee should obtain ethics advice before soliciting business from agency contractors that are not affected by her official duties. After she separates from Federal service, the post employment rules may restrict her activities. (See, Job Hunting and Post-Government Employment)

Example 4: A DoD employee hears rumors that the contractor he works with may be merging with another company. If the rumor were true, he would like to invest in the company. He would like to find out more from the contractor employees with whom he works. The DoD employee cannot ask a contractor for insider information about its business.

B. Endorsements The public must be confident that DoD is fair and impartial. That means DoD must treat all contractors, bidders, offerors, and potential contractors in the same way. While you may wish to express your appreciation directly to a contractor for good work or services, allowing those statements to be made public in connection with your name and DoD title or position would very likely give, or appear to give, an advantage to the contractor. Endorsements may be construed from casual statements made during informal conversations between Government and contractor employees. Before making any statements to a contractor about the quality of the work or performance, you should check with your ethics counselor and the contracting officer.

General Rule: DoD employees cannot use their Government title or position to endorse any non-Federal product or service. 5 C.F.R. 2635.702 (c).

Example 1: A DoD employee receives an unsolicited software product in the mail. After using it, she finds it to be excellent. When the vendor calls to follow up, she expresses her satisfaction in glowing terms. The vendor was not only eager to make a sale, but wanted to quote the DoD employee on the company brochure. She cannot permit a contractor to quote her oral or written comments in its literature in connection with her official title or DoD position. She cannot appear in media advertisements in her official capacity or wearing a DoD uniform or badge.

Example 2: Over the years a DoD employee has received a number of gifts, under $20, from contractors. A clamp with a company logo attaches his badge, his mouse pad is emblazoned with a company name, he drinks coffee from a mug displaying a contractor's name, and he carries his papers in a canvas tote bag discretely bearing the contractor's initials. DoD employees should consider the appearance to the public of using and/or displaying, in the office, mugs, calendars, mouse pads, badge holders, or other items containing company names, logos, or other symbolic references to particular contractors.

Example 3: At the end of a training class, the vendor asks the students for feedback. A DoD employee has enjoyed the class and writes a complimentary note on the evaluation sheet. She discovers later that the vendor has quoted her in the company's promotional materials. She cannot permit the company to use her name in connection with her DoD title and position. She can contact the company directly or refer the matter to her ethics counselor.

C. Appearance of Government Sanction (Letters of Recommendation)

As the author of a character reference or recommendation letter, one means of adding credence to the opinions that are expressed is to include credentials, including an official DoD position and title. Possibly, the beneficiary of a reference or recommendation will request the letter because of a DoD employee's official position and will expect that employee to identify his position and use agency letterhead. A DoD employee may use DoD letterhead and sign letters of recommendation with his official title if he has personal knowledge of the individual's ability or character and either: (1) his knowledge is derived from dealing with that individual through his Federal employment and the letter will be used for an employment recommendation; or (2) his recommendation will be used as part of an application for a Federal job. (Note: If the letter pertains to a contractor employee on an agency contract, the DoD employee must first coordinate with his ethics counselor and the contracting officer.) It is not sufficient to base the recommendation upon another individual's information or personal knowledge.

It is important to remember that while DoD employees may write a letter of recommendation supporting an employment application, they cannot use their official title and position or DoD letterhead to endorse either their own personal activities, services, or products, or those of another. Furthermore, DoD employees cannot state or imply that DoD or the Government endorses or sanctions their personal activities or those of another.

General Rule: DoD employees cannot use their DoD title or position to imply Government approval or authority for their own or another's activities outside the scope of their official duties. They may write a letter of recommendation to support an employment application on DoD letterhead and sign it using their official title when: (i) the reference is based on their personal knowledge of the ability or character of the individual and this knowledge was derived in the course of their Federal employment; or (ii) they are recommending the individual for Federal employment. 5 C.F.R. 2635.702(b)

Example 1: A contractor employee with whom a DoD employee has worked on an IPT in the past requests a letter of recommendation in support of her job application with a different private sector company. The DoD employee may write the letter on agency letterhead and sign it using his title and position. This recommendation, in support of an employment application, is based on his personal knowledge of the individual that he gained in the course of his Federal employment. He should check with the contracting officer before sending the reference letter to ensure the letter will not affect the Government's business relationship with the contractor.

Example 2: A member of the team that is led by a DoD employee asks that DoD employee to write a recommendation letter for her best friend, who is seeking a position with the contractor on the project. The DoD employee has never personally met the friend but her subordinate has talked about her for so long that the DoD employee feels as if she knows her. The DoD employee cannot write the recommendation letter on agency letterhead or use her official title or position because she does not have personal knowledge of the best friend's character or ability. Her knowledge is based on information she received from her subordinate employee.

D. Use of Nonpublic Information It is important for DoD employees to protect information that has not been released to the public. If DoD employees were to use nonpublic information for their own advantage, the public's trust in the integrity of its public servants would be lost.

Employees are cautioned to take particular care when discussing nonpublic information in partitioned work areas, in areas where contractor personnel are co-located, in elevators, break and rest rooms, cafeterias and other public areas. Employees must be alert to avoid inadvertently, or carelessly, releasing nonpublic information to contractor personnel. (See also, Use of Government Resources, examples 8, 11, 12, and 13.)

General Rule: Government employees may not use nonpublic information in connection with a personal financial transaction or to further their own or another person's private interests. 5 C.F.R. 2635.703.

Example 1: A DoD employee's current duty station is at a contractor facility. After attending a meeting back at DoD, she returns to her desk at the contractor's facility with the latest draft of the technical requirements for a RFP. She sends the document down to the copying room. Once this document leaves her possession, anyone at the contractor facility may read and copy it. She must be cautious to whom she gives access to nonpublic information. Contractor support personnel may not be authorized to have access to certain nonpublic information. Releasing the document to individuals who are not authorized to have it may be a criminal violation of the Procurement Integrity statute, as well as a regulatory violation. If the DoD employee requires copies, she must either make them herself or assign the copying to an individual authorized to have possession of the information. She must secure the document when she leaves her work area, such as, by locking it in her desk or a cabinet.

6. Support for Non-Federal Entities

A. Attendance at Non-Federal Entity Events

Employees routinely receive unsolicited announcements about a variety of events. It may be beneficial for the Government to permit you to attend meetings, seminars, conferences, and similar events when your attendance will serve a legitimate DoD purpose, such as, if the subject matter of the event will enhance your ability to do your job.

General Rule: Agency Designees (usually the supervisors), may permit employees to attend non-Federal events in their official capacities, at Government expense, if there is a legitimate Government purpose served by the attendance. JER, Section 3-200.

Example 1: A DoD employee has been invited at no cost to attend a conference sponsored by a DoD contractor. The conference is about a subject related to her work. With prior approval from her agency designee, she may attend the conference at Government expense. Free attendance to the conference is a gift. See, Gifts, for rules about accepting an offer of free attendance to a conference, meeting or similar event.

Example 2: Employees must always consider whether an appearance of impropriety would be created by accepting an invitation from, or extending an invitation to, a contractor employee for attendance at parties or similar events.

B. Speaking Engagements and Participation in and Logistical Support for Conferences and Similar Events.

Often, DoD employees are invited to speak, participate in a workshop or panel, or make a presentation at a non-Federal entity event. Employees may be authorized by the heads of DoD Component commands or organizations to participate in non-Federal entity events where such participation meets public affairs guidance (DoD Directive 5410.18, "Community Relations"), does not interfere with the mission, is not favoring one entity over others, and does not support a profit-making function. Commonly, sponsors offer the speakers or other participants free attendance. For the rules on accepting free attendance, see Gifts.

General Rule: With approval from the head of the DoD Component command or organization, who must determine that all of the seven factors below are met, employees may make presentations, speeches and otherwise participate in conferences, meetings, workshops, panels and similar events and the component or organization can provide logistical support for the event. In order for DoD to support a non-Federal entity event, other than a fundraising or membership drive, the head of the DoD Component command or organization must make all of the following findings: (1) the support does not interfere with the performance of official duties and would in no way detract from readiness; (2) DoD community relations with the immediate community and/or legitimate DoD public affairs or military training interests are served by the support; (3) it is appropriate to associate DoD, including the concerned Military Department, with the event; (4) the event is of interest and benefit to the local civilian community, the DoD Component command or organization providing the support, or any other part of DoD; (5) the DoD Component command or organization is able and willing to provide the same support to comparable events that are sponsored by other similar non-Federal entities; (6) the use is not restricted by other statutes or regulations; and (7) no admission fee (beyond what will cover the reasonable costs of sponsoring the event) is charged for the event (or the portion of the event supported by DoD), or DoD support to the event is incidental to the entire event in accordance with public affairs guidance. JER, Sections 3-207 and 3-211.

Example 1: A DoD agency receives a request from a contractor to provide a speaker at an association's upcoming conference in Paris. A DoD employee's boss asks her to make the presentation. Two weeks later she is assigned to take official action on a contract requirement for which the contractor is the prime contractor. Both activities are official duties; therefore, she may carry out both assignments. She can make the presentation at the conference if the head of her DoD Component command or organization approves the activity. She must, however, consult with her ethics counselor before she accepts free attendance to the conference, or if the contractor offers to pay her travel expenses, or otherwise offers her any gifts. See, Gifts.

C. Membership and Management A DoD employee's participation in organizations, on committees, etc., by representing the interests of DoD in furtherance of the agency mission, provides the agency with the opportunity to express an official position in a public forum. DoD may also benefit from receiving feedback from the public networking with the interested community and staying abreast of activities outside the Government. The DoD employee's participation as a liaison to the non-Federal organization, in her official capacity, may be authorized by the head of the DoD Component command or organization. She may be asked to join a board of directors or advisory board of a non-Federal entity in her official capacity. Generally, such participation in the management of a non-Federal entity is not permitted unless specifically authorized by the DoD General Counsel. DoD employees may be members and may participate in the management of non-Federal entities as

individuals in their personal capacities provided they act exclusively outside the scope of their official position and provided that the offer was not based on the employee's DoD assignment or official position. When acting in a personal capacity, DoD employees should not use or allow the use of their official titles or positions; military ranks and honorifics, however, may be used.

General Rule:

(1) Membership: Employees may be appointed by the Head of the DoD Component command or organization to serve as liaisons to non-Federal entities in their official capacities under a DoD Component membership. Liaisons represent DoD interests in an advisory capacity. They may not bind DoD to any action, nor may they vote or participate in management or control of the non-Federal entity. Employees may become members in non-Federal entities in their personal capacities, provided they act exclusively outside the scope of their official positions. JER, Section 3-201.

(2) Management: Unless authorized, employees may not, in their official capacities, serve in positions of management or control of a non-Federal entity, including serving on boards of directors and management committees. JER, Section 3-202. Employees may serve in management positions with non-Federal entities in their personal capacities if they act exclusively outside the scope of their official position and the position was not offered because of the employee's DoD assignment or position. JER, Section 3-301.

Example 1: A DoD employee is involved in a research project at a contractor site. The contractor's technical personnel meet weekly to share information and progress reports. These meetings include discussions about contracts other than the one she is assigned to work on for DoD, as well as developing future business. The DoD employee has been asked to participate in the meetings. She may participate in the portion of the meeting that pertains to her assigned duties on the agency contract. Employees working at contractor sites may not participate in the contractor's performance of a Government contract or other contract outside of their assigned duties. Unless authorized to do so, employees should not provide feedback, comments, or other response to a contractor's performance. Employees may not provide advice, recommendations, or other assistance to the contractor in its effort to obtain new Government business or other new business.

D. Remuneration To preserve a DoD employee's ability to be impartial in the performance of his or her official duties, the employee cannot accept compensation from any source other than the Federal Government for performing those duties. There are some circumstances, however, where it is appropriate for a DoD employee to accept a tangible form of recognition for a job well done. For example, certificates, cards, trophies, or other items, of little intrinsic value, may be accepted. (See, Gifts.)

General Rule: DoD employees may not receive any salary or supplementation to their Government salary from any non-Federal entity for performing their Government duties. 18 U.S.C. 209; JER, Section 3-205.

Example 1: A DoD employee has worked on an IPT composed of DoD and contractor personnel. The team leader is a contractor employee. The team leader awards everyone on the team a certificate of achievement. The DoD employees may keep the certificate because it was the result of official activities and has little intrinsic value.

Example 2: It's been five years, and the program that a DoD employee has worked on with contractor personnel has just been completed. The contractor brings in a cake and sodas to celebrate. The contractor has made up baseball caps to commemorate the project, which are distributed to all personnel who worked on the project. The contractor also distributes cash awards to all contractor and DoD personnel on the project. Modest non-meal food items are not considered to be gifts, so Government employees may enjoy the refreshments. If acceptance of the baseball cap is in accordance with the rules on Gifts, they may keep the cap (*i.e.*, if the value of the cap is $20 or less, they may accept it). DoD employees, however, may never accept cash awards from DoD contractors.

Example 3: The contractor, which works on a project with DoD employees, is sponsoring a drawing for a trip to Hawaii. All contractor personnel and DoD customers are eligible to enter. A DoD employee enters the contest and wins the trip. She cannot accept the trip because DoD employees may only accept prizes from random drawings that are open to the general public. DoD employees should not participate in contractor-sponsored drawings, lotteries, or pools for prizes or gifts, if they would not be able to accept the prize or gift under the gift rules.

Example 4: A DoD employee has been assigned to attend a conference in his official capacity. Although the conference is open to the general public, the sponsor is charging a registration fee for attending all of the conference events. The conference includes an exhibit area where interested parties can set up displays. The exhibit area is only open to conference attendees. Any attendees who talk with representatives at twenty booths may enter a random drawing for a computer. A DoD employee visits over 20 booths, enters the contest and wins the computer. The prize belongs to the Government because the drawing was not open to the general public, but only to conference attendees who paid the conference registration fee and visited twenty booths. Furthermore, the DoD employee was on official duty and the Government paid the registration fee.

Example 5: A newly-hired DoD employee, having recently left private sector employment, will be receiving payments from her former employer. If she is receiving payments, such as annuity payments, a bonus that is paid at the end of the company's fiscal year, or other payments, she should contact your ethics counselor for guidance. Certain payments may violate a criminal statute (18 U.S.C. 203 and 209).

E. Charitable Fundraising DoD employees are free to engage in volunteer and personal charitable activities when they are not on duty, at the worksite, or otherwise acting in an official capacity. DoD employees, however, may not personally solicit contractor employees either on or off duty.

General Rule: Employees may not participate in personal charitable fundraising at the worksite. The head of the DoD Component command or organization may authorize collection boxes for food or toys to be placed in designated public areas. JER, Section 3-300. Employees may not engage in personal charitable fundraising with contractor personnel. 5 C.F.R. 2635.808(c).

Example 1: The religious organization that a DoD employee is affiliated with is sponsoring a night each month at a homeless shelter for members to cook,

provide maintenance to the facility and counseling to the residents. The DoD employee knows that one of the contractor employees is part owner of a restaurant. She would like to ask for donations of excess food to use at the shelter. She cannot solicit contractor employees, either on or off duty, for contributions, or to participate in group "runs" for charity, to sponsor an employee's participation in a charitable "walk" or "run," or to purchase cookies, gift wrap, candy bars or similar items in support of personal charitable activities.

Example 2: A contractor employee working at a DoD facility, who is involved in the fight against cancer, is organizing a carnival to raise funds. He has posted a sign up sheet for contributions and volunteers on his door. Agencies may have particular policies regarding charitable fundraising at the worksite or be subject to particular property regulations. Contractor employees must consult with the contracting officer or contracting officer's representative, who can seek ethics advice on the propriety of this activity.

F. Distributing Information It is in the interest of the Government for its employees to receive information about, or be made aware of, events of interest to the agency.

General Rule: In accordance with public affairs regulations, official channels may be used to notify employees of events of common interest sponsored by non-Federal entities. JER 3-208.

Example 1: Many agency employees received undergraduate degrees in a particular field of study from the same university. Virtually all of those employees studied with a particular professor. Her course laid the groundwork for the expertise the employees are applying to their Federal jobs. The professor is retiring and the university is sponsoring a weekend of events to honor the professor's career. If it is in accordance with agency policy, an agency designee may permit use of the Government email system to distribute this information to employees.

G. Teaching, Speaking and Writing DoD employees, acting in their personal capacity, may wish to, or be asked by contractors to, engage in teaching, speaking or writing in connection with professional activities. It may be possible for employees to participate in these activities, with advice from their ethics counselor, and so long as the participation does not violate any statute, rule, or policy. If the subject matter concerns an agency program, policy, or the employee's official duties, security clearance and public affairs guidance may be required, in addition to ethics guidance. A disclaimer may be required. Employees should discuss acceptance of honoraria or compensation, when they are acting in their personal capacities, with their ethics counselor. Acceptance of honoraria or compensation is never permissible when employees are acting in their official capacities.

General Rule: Speeches, writings, or teaching in an employee's personal capacity, in association with a contractor employee, must be in accordance with the law, and agency policy, and may require a disclaimer, and security and public affairs clearance. Such activity should not be undertaken without the advice of an ethics counselor. JER 3-307.

Example 1: A DoD employee and a contractor employee have been working together to create a software program as part of their official duties. On their own time, the DoD employee and the contractor employee would like to jointly author a paper to submit for presentation at an upcoming professional

association conference. The DoD employee should seek guidance from her ethics counselor prior to starting the paper. Her ethics counselor, in coordination with the contracting officer, will need to review the specific facts pertaining to this situation.

Example 2: A DoD employee has worked with a contractor employee developing standards for map products. The contractor employee, on his own time, has written a reference book about these standards. The book has been accepted for publication. He asks the DoD employee to review and comment on the draft. The DoD employee cannot use official time or resources to support the contractor's private commercial enterprise. While it may be permissible for the DoD employee to review the draft in his personal capacity, he should check with an ethics counselor prior to engaging in this activity.

7. Travel and Transportation

A closer working relationship with contractor personnel, including co-location, may raise issues concerning the use of transportation that is provided either by the Government or the contractor. Because Government employees and contractor employees may work in close proximity to each other and may work on similar issues as part of the same team, they may lose their identity as Government or contractor employees. Even though they may work closely on a particular project, they still work for different bosses.

There are statutes and regulations concerning the use of Government transportation and the use of contractor transportation. These rules may not be obvious, and actions that may appear expedient or in the best interests of the Government and the contractor may violate these rules. Generally, Government employees and contractors can successfully perform their missions within these rules. Government officials should always consider the purpose of the travel to determine whether there is an appearance of a conflict of interest. They should work closely with their ethics counselor because these rules are not intuitive and are often complex.

General Rule: Official travel by DoD employees must be funded by the Federal Government directly or through a contract, unless the travel or transportation services are accepted and processed in accordance with the Component's gift acceptance procedures and Chapter 4 of the Joint Ethics Regulation: as a gift to the DoD Component under a gift acceptance statute, as a gift to the DoD Component under 31 U.S.C. 1353, as a gift from a tax-exempt organization under 5 U.S.C. 4111, or as a gift from a foreign government under 5 U.S.C. 7342.

Example 1: A contractor operates a shuttle between a co-located program office and a Command's headquarters. The DoD employee would like to use the shuttle to carry out official Government business (attend a meeting). The DoD employee's use of the contractor shuttle is permissible only if: (1) the contractor-provided transportation is funded by the Government such that the contract specifically requires the contractor to provide transportation to Government employees; or (2) the transportation is accepted as a gift to the DoD Component.

Example 2: A contractor employee offers to drive a DoD employee to a professional conference to which they have both been invited that is 250 miles away. This is permissible, with advance approval, because 31 U.S.C. 1353 and 41 C.F.R. 304-1.2 permit heads of DoD Components to accept travel

benefits from a non-Federal source in connection with their attendance in an official capacity at a meeting or similar function (see JER 4-101a). Such travel must be approved in advance by the proper acceptance authority. The statute may not be used to accept the offer of travel from a contractor to attend meetings that carry out the mission of the Government employee, such as investigations, inspections, audits and site visits. It also may not be used to accept travel to promotional vendor training or other meetings held for the primary purpose of marketing the products of a non-Federal entity. When 31 U.S.C. 1353 does not apply, payment of the fair market value by the employee may be permissible.

Example 3: A DoD employee and a contractor employee are on official travel and would like to split the cost of a taxi ride to the airport. This is permissible. Sharing the cost of the taxi ride with the contractor is permissible because each traveler would pay his or her pro rata share to the neutral provider of the transportation. The DoD employee should, however, consider whether sharing the taxi might constitute an appearance of a conflict of interest. For example, it may not be advisable for a contracting officer in the midst of a source selection to share a taxi with an employee of one of the offerors.

General Rule: Personal travel or transportation service provided by a contractor is considered a gift to the employee from a prohibited source. It may only be accepted if one of the exceptions allowing the acceptance of a gift from prohibited sources (such as the exception that allows gifts of $20 or less per occasion and $50 per calendar year) applies or if the Government employee pays fair market value. Contractor transportation provided for official business may be accepted in advance by an appropriate agency official as a gift to the Government.

Example 1: A DoD employee carpools with contractor employees in their privately owned vehicles. This is permissible because a bona fide car or vanpool arrangement is not considered a gift to the Government employee because they share expenses.

Example 2: A contractor employee offers to drive a DoD employee to lunch at a restaurant ten miles off-base in his personal vehicle. The DoD employee may accept the ride if it fits within the exception of 5 C.F.R. 2635.204(a) (the $20 exception). There may be an appearance problem that requires discussion with an ethics counselor if, for example, this arrangement occurs frequently or the DoD employee is making official decisions affecting the contractor.

Example 3: A DoD employee is co-located with a contractor employee at a contractor facility and would like to ride in the contractor shuttle as part of his commute. This use of the contractor shuttle is personal travel and is a gift to the employee. Therefore, the DoD employee may ride the shuttle only if he pays fair market value for it, or if it falls within the gift exception of 5 C.F.R. 2635.204(a), the $20 exception.

Example 4: While on official travel, a DoD employee is offered free ground transportation by a contractor employee after working hours to go to dinner at a local restaurant. This transportation should be analyzed as a gift to the employee, rather than as a gift to the Government, since it would apparently be provided to the employee for his own personal benefit.

Example 5: A contractor operates a shuttle between two contractor sites. Where it is necessary or expedient for employees of the contractor and the

Government to travel together in order to observe certain local conditions on route, to discuss matters or continue a meeting during a lengthy transit between sites, or because of extraordinary time constraints on the overall visit, the transportation might be a legitimate adjunct to the meeting, and not a gift.

General Rule: Government owned and leased vehicles may be used only for official purposes.

Example 1: A contractor employee asks if he can ride the Government-owned shuttle between the co-located program office and the command's headquarters. This is permissible because the contractor employee's attendance at the meeting would be considered an official use of the Government owned vehicle. 31 U.S.C. 1344(a) prohibits the use of Government owned or leased passenger vehicles for other than official purposes. Section 5-6 of DoD Directive 4500.36-R, Management, Acquisition and Use of Motor Vehicles, permits DoD contractor personnel conducting official defense business to use DoD shuttle bus services. There may be liability issues involved that require consultation with the Component attorney.

8. Training

A. Government Employee Attendance at Contractor Sponsored Training

General Rule: Accepting a gift of training from a prohibited source is generally prohibited under 5 C.F.R. 2635 Subpart B. There are some statutory and regulatory exceptions to this prohibition that may permit Government employees to take advantage of free contractor training.

When offered a gift of training, an employee's first step should be to contact his or her local ethics counselor. The counselor will determine whether a particular exception will permit an employee to accept an offer of free training. If an exception applies, the counselor must then determine if there are any appearance issues that would preclude acceptance of the gift. If the counselor determines that an exception applies, and that there is not a substantial appearance of a conflict of interest in accepting the gift, then the counselor may advise an employee that he or she may accept the gift of free training.

DoD employees should be aware that training provided by a contractor in accordance with a statement of work, or that is intended to facilitate the use of products or services that have been provided under a Government contract, is not considered to be a "gift". DoD employees may attend such training. Employees should also keep in mind that notwithstanding the exceptions below, it is not appropriate to accept vendor promotional training. Vendor promotional training is training provided by a person for the purpose of promoting its products or services.

Here are the provisions that authorize DoD employees to accept gifts of training from a contractor (approval for each of these authorities must be sought in advance of the event):

1. 31 U.S.C. 1353, Acceptance of Payment from a Non-Federal Source. This statutory exception allows an agency to accept free attendance for training that is held away from an employee's official duty station. Training does not have to be open to members throughout a given industry

or profession, nor does it have to represent a range of persons interested in the subject matter to qualify for this exception.

2. 5 U.S.C. 4111. As implemented by 5 C.F.R. 410.501-602, this statute may allow a civilian employee to accept certain benefits in connection with non-Government sponsored training. This authority applies to training that an employee attends while on official duty or training that has been paid for in whole or in part by the Government. This exemption only applies to benefits provided by tax-exempt organizations, such as non-profit institutions or universities. Records on the gift must be maintained by the agency.

3. 5 C.F.R. 2635.204(g), Widely Attending Gathering. The widely attended gathering exception allows an employee to accept free attendance at a training event. Widely attended gatherings must be open to a wide audience or represent a range of persons interested in the subject matter. Attendance at most in-house training is likely to be limited to employees from the sponsoring event and, therefore, would normally not be approved. The offer of free attendance may be from the sponsor of the event, or from another entity. If the free attendance is from another entity, there must be at least 100 attendees at the event and the value of the free attendance must be $250 or less. These restrictions do not apply if the free attendance is from the sponsor of the event, which includes situations where the sponsor selects the DoD employee(s), even though someone other than the sponsor will pay for the attendance.

Example 1: A DoD employee is offered free attendance at a training class offered by a contractor. The training will be held in Frederick, Maryland. The DoD employee's official duty station is in Fairfax County, Virginia. The DoD employee hopes to attend the training because it will increase his skills and knowledge in areas that directly relate to his official duties. He works directly with several employees of the contractor, but he does not manage the contract nor make any funding decisions with respect to that contractor. The contractor is offering this gift of free training to a limited number of DoD employees in the agency who would benefit in their official capacity from attendance at the training.

The proposed training may not be accepted under 5 U.S.C. 4111 because the contractor is a for-profit company. The proposed training does not comply with the "widely attended gathering" exception, as it is in-house training for contractor employees. The training does, however, qualify for 31 U.S.C. 1353. The training is offered away from the DoD employee's duty station, approval was sought in advance of the event, the training relates to his official duties, and it is not vendor promotional training. Further, the offer of free attendance was not solicited by the DoD employee, and the ethics counselor determined that his participation will not bring into question the integrity of the agency's programs or operations.

B. Contractor Employee Attendance at Government Sponsored Training

General Rule: An agency may provide training to contractor personnel if required under the contract or it does not create a conflict or give the appearance that the agency is favoring a contractor.

If the agency considers these issues and determines that allowing contractor personnel to attend Government training is appropriate, then the issue becomes one of fiscal law. If the agency has statutory authority to

expend funds on training for non-Government personnel, then that is a permitted activity. In most instances there is no clear statutory authority. In those cases, an agency must determine if such training is a "necessary expense" under the relevant program appropriation (See 31 U.S.C. 1301(a)). This involves weighing the costs associated with training non-Government personnel against the benefit gained by the Government in support of the appropriation that will incur the expense. Obviously, as the costs associated with the training increase, so must the nexus between the costs and the benefits gained by the Government. Without the authority to retain training proceeds, any contractor reimbursements must be deposited in the General Fund of the treasury as miscellaneous receipts. If it is determined that training of contractor employees is appropriate, whether on a voluntary or mandatory basis, it should be included in the contract.

Example 1: A DoD employee asks his ethics counselor whether he can invite a contractor employee to attend Government environmental compliance (EC) training. The contractor employee works on a support contract for the agency. He provides assistance and advice to agency program managers. The skills and responsibilities required for his duties are similar to that required for these agency employees. The agency does not have specific statutory authority to provide training to non-Government personnel. In consultation with fiscal law attorneys, the ethics counselor determines that the proposed costs for permitting the contractor employee to attend the training are negligible. EC training is already being offered to agency employees. Therefore, the only cost associated with the contractor employee's attendance is the cost of providing him with written training materials. Further, the benefits of allowing the contractor employee to attend are high. The training will increase his knowledge in an area that directly impacts his ability to support agency employees. Under these circumstances, it is appropriate to invite the contractor employee to attend the agency training.

Example 2: The DoD employee asks whether he can require a contractor employee to attend the EC training. He may not do so unless the training is required under the contract.

The following is a synopsis provided by this guidance: (1) Remember that contractor employees are not Federal employees; (2) Identify contractor employees; (3) Respect the employer-employee relationship between contractors and their employees; (4) Avoid giving incumbent contractors unfair competitive advantage; (5) Identify possible conflicts of interest of contractor employees; (6) Safeguard procurement, Privacy Act, confidential or other non-public information; (7) Beware of contractor employees bearing gifts!; (8) Don't ask contractor employees to perform "out of scope" work, personal services, or "inherently governmental functions;" (9) Resolve inappropriate relationships between Federal and contractor employees; and (10) Address ethical issues with your ethics counselor promptly.

This guidance was prepared to illustrate various ethics and acquisition issues arising from the increasing use of contractors in the DoD workplace. It is not a substitute for ethics and legal advice. The rules in this area are complex and evolving. Application depends on the specific facts of a situation. When these issues arise, please contact your ethics counselor and contracting personnel.

GOVERNMENT/CONTRACTOR RELATIONS

1. CONTRACTOR EMPLOYEES ARE NOT "BLUE BADGERS" REGARDLESS OF WHETHER THEY ARE FORMER GOVERNMENT EMPLOYEES OR WORK FOR A SETA CONTRACTOR.

2. CONTRACTOR EMPLOYEES DO NOT WORK FOR GOVERNMENT EMPLOYEES.

3. GOVERNMENT EMPLOYEES DO NOT WORK FOR CONTRACTOR EMPLOYEES.

4. CONTRACTOR EMPLOYEES ARE NOT GIVEN ORGANIZATIONAL TITLES NORMALLY HELD BY GOVERNMENT EMPLOYEES SUCH AS PROGRAM MANAGER OR STAFF MEMBER.

5. CONTRACTOR EMPLOYEES DO NOT MAKE DECISIONS, ONLY RECOMMENDATIONS, FOR GOVERNMENT PROGRAMS.

6. CONTRACTOR EMPLOYEES CANNOT DECIDE ON THE BUDGET FOR A PROGRAM OR DECIDE WHICH COMPANIES WILL BE SOLICITED OR WHICH COMPANY WILL BE AWARDED A CONTRACT.

7. CONTRACTOR EMPLOYEES MUST ALWAYS IDENTIFY THEMSELVES IN BOTH WRITTEN AND ORAL COMMUNICATIONS AS CONTRACTOR EMPLOYEES.

8. CONTRACTOR EMPLOYEES CANNOT USE GOVERNMENT RESOURCES, SUCH AS TRADING@NSA OR OTHER SYSTEMS PROVIDED FOR THE CONVENIENCE OF GOVERNMENT EMPLOYEES, FOR PERSONAL USE OR OTHER CONTRACTOR-RELATED USES, UNLESS SPECIFICALLY WITHIN THE CONTRACT SCOPE.

9. CONTRACTOR EMPLOYEES CANNOT MARKET OR SOLICIT FUTURE BUSINESS USING GOVERNMENT RESOURCES SUCH AS EMAIL AND FAXES OR WHILE BILLING THE GOVERNMENT FOR THEIR TIME.

10. CONTRACTOR EMPLOYEES CANNOT ATTEND GOVERNMENT-SPONSORED TRAINING OR CONFERENCES UNLESS SPECIFICALLY WITHIN THE CONTRACT SCOPE.

THE LAWS RELATING TO GOVERNMENT/CONTRACTOR RELATIONS

There are primarily two bases in law from which the Top 10 list is derived. The first law relates to personal services contracts. A personal services contract is one in which an employer-employee relationship is created between the Government and a contractor employee, either by the contract's terms or how it is administered. The key indicator of such a relationship is supervision by the Government of a contractor employee. Statutory authority is required for personal services contracts. The Agency has limited authority for such contracts: (1) experts and consultants and (2) certain language personnel. But, not every skill group, even computer science, for example, qualifies as an expert. Furthermore, the Agency awards very few contracts in any given fiscal year that are actually personal services contracts. Also, when such contracts exist, they are usually with individuals, not with companies. Agency employees should assume that the contractor employees in their offices are not on personal services contracts. Thus, supervision of contractor employees would be improper.

The second law relates to inherently government functions. Such functions are defined in the Federal Activities Inventory Reform Act of 1998 and in OFPP Policy Letter 92-1, "Inherently Governmental Functions." Any functions considered inherently governmental cannot be performed by contractor employees, except by those contractor employees specifically working on personal services contracts. The Federal Acquisition Regulation (FAR), at Part 7.5, repeats what is in the policy letter. Particularly useful are two FAR sections that give examples of functions that are normally considered inherently governmental, and ones that are not. Several items on the Top 10 list are based on examples in the FAR of inherently governmental functions.

The other items on the Top Ten list are derivatives of these laws. While the Agency's use of contractor employees working in-house has certainly increased, and will probably continue to do so, the laws governing the relationship between government and contractors have not changed. Simply because a government employee is entitled to certain rights and benefits does not mean an in-house contractor employee is entitled to the same. For example, while government employees may be authorized

limited use of government systems for personal use, such as using desktop computers to access Trading@nsa, this limited use rule does not apply to contractor employees.

Based on the number of questions received by both the Office of General Counsel (OGC) and Office of Inspector General, it appears these laws are not closely followed, and may be violated on a regular basis. Anyone engaging in any of the items on the Top Ten List should desist immediately. OGC will be issuing further guidance on some of these rules, including access by contractor employees to Agency-authorized training.

For further guidance on these subjects, please contact the Acquisition and Logistics Practice Group of the OGC, at 977-7147.

TOP 10 LIST:
RULES FOR AVOIDING IMPROPER PERSONAL SERVICES CONTRACTS

1. Contractor employees are not part of a Government office's staff and cannot be represented as such on Agency organization charts, web pages and email signature blocks.

2. Government employees do not interview contractor employees and recommend specific contractor employees to work on specific contracts or recommend individuals that a contractor should hire.

3. The contractor, acting through its program manager, decides which contractor employees should be assigned new Government taskings, whether particular contractor personnel are carrying too heavy a workload, and whether overburdened contractor personnel should delegate work to other contractor personnel. Government employees do not make these decisions.

4. Government employees do not review or approve time cards for contractor employees or otherwise determine what hours a contractor employee works or when he/she takes vacation/sick leave.

5. Government employees do not approve requests for contractor employees to attend government-sponsored training unless that government employee is the Contracting Officer (CO) or the Contracting Officer's Representative (COR) and the training is contemplated by the contract.

6. Government employees do not evaluate individual contractor employees' performance via performance appraisals nor do they recommend that a contractor give its employees pay raises, promotions or cash awards.

7. Government employees do not counsel or otherwise discipline contractor employees.

8. Government employees do not ask a contractor to fire one of its employees.

9. The contractor's job includes being concerned about the morale and performance of its employees.

10. Status as a government retiree does not entitle a contractor employee to any more rights/benefits than any other contractor employee receives (other than personal ethics advice).

Applying Rules for Avoiding Improper Personal Services Contracts

These rules are based on actual questions asked of the General Counsel's office. The purpose of these rules is to ensure that a personal services relationship is not inadvertently created by a government manager who supervises contractor employees and treats them as if they were government employees. A good rule of thumb is that if a government manager is treating government and contractor employees the same, supervision is most likely occurring. As stated in the first Top Ten List, unless the contract is specifically designated as personal services, such supervision creates an improper personal services relationship.

Applying the following general rules will help ensure that improper supervision does not occur:

(1) Physically separate contractor employees and government employees if both work in the same office space. This is as true for SETA personnel as it is for computer scientists and engineers.

(2) Ensure that the statements of work and task orders issued in contracts are specific enough so that day-to-day direction and tasking are not required. Work not clearly specified in the contract must be cleared through the CO since only a CO has authority to change a contract. Also, any additional tasking should be done through the contractor's program manager and not directly to individual contractor employees.

(3) Move to performance based contracts which should help ensure that supervision does not occur if the statements of work for those contracts are properly drafted so that the end result is what matters, not how a contractor gets to that end on a daily basis.

(4) Ensure that the contractor employees' actual contractor supervisor makes regular contact with his/her employees. The contractor supervisor must also be responsible for performance, discipline, training, and work assignments not specifically addressed in the contract.

These are issues that are not unique to NSA. NASA and the EPA are examples of other agencies that have identified similar problems and made efforts to solve them. In fact, EPA drafted a clause that it places in its service contracts that provides general guidelines to ensure a personal services relationship is not inadvertently created. The General Counsel's office is working with the SAE's office to draft a similar clause for NSA contracts. One must keep in mind, however, that an improper personal services relationship can be found even if such a clause is in the contract if government supervision still occurs.

The following are good reasons why a government manager should be concerned about supervising contractor employees:

(1) Part of the contract price, even though not specified as a line item, is for the contractor to manage the contract. Part of management includes managing its people. The Government should not usurp the contractor's responsibility but should require the contractor to provide the contract management for which we are paying.

(2) Some changes, although they may seem minor, such as asking a contractor employee to change his/her work schedule or perform an additional task, may result in a claim from the contractor for an increase in price. While the CO may be able to make arguments that would not require it to pay more, in making those arguments the CO may have to acknowledge that the person who changed the contract had no authority to do so. Do you want to be identified as the person who made an unauthorized change to the contract? Remember,only a CO--not even a COR--has authority to change the terms of the contract.

(3) When a government manager allows a contractor employee to attend unauthorized training or spend time on Trading@NSA, and such other activities, the Government is not getting what it is paying for under the contract, such as software developed or assistance in drafting documents for a new acquisition. The government may then have to pay more to get those tasks completed if a cost type or fixed price level of effort contract is being used. Furthermore, a government manager permitting such misbilling contributes to the misuse of government resources.

(4) We are all guardians of the taxpayer's (our) money and should be mindful that it is spent appropriately. This includes following the law on personal services contracts.

(5) In addition to generating acquisition and fiscal concerns, supervision of contractor employees by the Government has personnel implications. Inappropriate conduct (e.g., sexual harassment) by contractor employees may be attributed to the U.S. Government on the rationale that the contractor employee was jointly employed by the Government. In deciding whether the Government may be liable for offensive contractor conduct, the failure to follow the rules for avoiding improper personal services contracts may be highly relevant. The Inspector General's office is actively investigating allegations of improper personal services relationships. Three such investigations have been completed this year.

(6) Some have asked whether SETA (scientific and engineering technical assistance) contractors should be treated differently. The answer is no. SETA contractor employees are contractor employees like all others. Thus, the rules that apply are the same. In fact, the rules may be more onerous when one considers the types of information to which SETA contractor

employees oftentimes have access, e.g., budget information, and the type of work they are generating, e.g., statements of work for future procurements. Because of such issues, organizational conflict of interest questions are of increased concern, particularly when it comes to avoiding the creation of unfair competitive advantages in those contractors.

Some have also asked whether former agency employees who return as contractor employees should be treated differently. Again, the answer is no. The rules are the same, including the ones on use of government resources and training. The only difference is that former government employees are entitled to receive ethics advice from the Standards of Conduct Office. As OGC said in our first Top Ten List, the color of the badge does make a difference.

GUIDANCE TO CONTRACTING OFFICERS ON ORGANIZATIONAL CONFLICT OF INTEREST

(This article was prepared by Paul Kominos of the Office of Associate General Counsel (Acquisition & Logistics) and offers guidance to Contracting Officers on organizational conflicts of interest. This article should prove very helpful in understanding, processing, and obtaining expeditious legal review of these issues.)

This article is intended to provide guidance for Contracting Officers (CO) faced with potential Organizational Conflict of Interest (OCI) issues. Realizing that not every possible question or scenario can be anticipated, the Office of Associate General Counsel (Acquisition and Logistics) recommends contacting thier office at the earliest possible sign that a procurement may result in an OCI. The delays caused by bid protests and the need to protect the integrity of the procurement system requires COs to diligently scrutinize solicitations and proposals to avoid, mitigate, or neutralize potential conflicts.

The Federal Acquisition Regulation (FAR) Subpart 9.5 is the first source of information when addressing a possible OCI issue. This subpart not only defines what an OCI is, but also prescribes responsibilities and procedures to follow when a CO is confronted with an OCI. The FAR provides examples of situations which may constitute an OCI. Those examples, and many others, will be discussed throughout this article.

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The first step to understanding this issue is to establish a definition of an OCI. FAR 9.501 states,

"OCI means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage."

The critical element is the existence of a relationship or even a potential relationship that is likely to result in

unequal access to information, biased ground rules, or impaired objectivity on the part of a contractor, Aetna Government Health Plans, Inc., (B-254397.19, July 27, 1995, 95-2 CPD 129). In any given procurement an OCI may affect all potential offerors or a single offeror. For example, all potential offerors could be affected because of the restriction on access to proprietary information of other companies or as a result of a restriction on working on future procurements. A single offeror may have an OCI due to subsidiary or affiliated companies within its corporate structure.

The FAR describes the following example to illustrate an OCI. If XYZ Corporation prepares the statement of work to be used in competitively acquiring a system or service or assists the Government in reviewing the proposals, XYZ may not supply the system or the services to the Government. Clearly, XYZ Corporation would have an unfair competitive advantage and access to competitors' proprietary information.

The unfair competitive advantage and impaired objectivity described above would result in biased ground rules and unequal access to information favoring XYZ Corporation. If action is not taken to avoid the OCI, the Government would most likely see a bid protest being filed by the other offerors.

FAR 9.502(b) states that an OCI is most likely to occur in contracts involving management support services, consultant or other professional services, contractor performance of or assistance in technical evaluations, or systems engineering and technical directions work. But the fact of the matter is that an OCI can occur in any type of contract. Due to this wide range of possibilities, COs must be vigilant in identifying these issues.

Responsibilities

Using the rules and procedures outlined in FAR 9.504, COs are responsible for analyzing planned acquisitions early on to identify and evaluate potential OCIs. Consequently, the evaluation process leads to avoiding, mitigating, or neutralizing significant potential OCIs before award. Final decisions made with respect to the evaluation process must be coordinated with the General Counsel's Office and the technical element requesting the procurement. Current contracts must also be analyzed to ensure OCIs are addressed at the earliest possible opportunity. In order to better understand what to look for, the FAR provides guidance in the following situations.

Company A receives a contract to prepare a detailed plan for scientific and technical training of an agency's personnel. It suggests a curriculum that the agency endorses and incorporates in its request for proposals to establish and conduct the training. Company A may not be awarded the contract to conduct the training. FAR 9.508(g).

The rationale for this prohibition is that Company A is in a position to favor its own products and capabilities. To overcome this possibility of bias, Company A is prohibited from supplying the training services to the Agency. By comparison, review the following permissible scenario.

Company B is the systems engineering and technical direction (SETD) contractor for system X. After some progress, but before completion, the system is canceled. Later, system Y is developed to achieve the same purposes as system X, but in a fundamentally different fashion. Company C is the systems engineering and technical direction contractor for system Y. Company B may supply the system or its components. FAR 9.508(b).

Because Company B no longer supplies the systems engineering and technical direction for the system they are not in the position to influence the direction of the program. In performing SETD functions, contractors are in a highly influential and responsible position in determining a system's basic concepts. By removing Company B from that position, the Government has eliminated any possibility of an OCI.

Mitigation

Since not all conflicts can be avoided, the FAR authorizes the CO to mitigate conflicts. Mitigation of an OCI permits the conflicted offeror to submit a proposal for a contract in it would otherwise be prohibited. Generally, in these situations the conflicted contractor establishes a conflict mitigation plan for submission in its proposal. The plan is then evaluated along with other non-cost related factors. In situations where the OCI is identified after award, the mitigation plan is a joint effort between the Government and the contractor. Whether the plan is submitted in the proposal or after award, the result should include the necessary steps to identify and avoid or mitigate potential OCI issues during contract performance.

Elements of conflict mitigation plans are fact specific. Therefore, each submission needs to be reviewed in light of the relevant circumstances. However, the backbone of any mitigation plan must establish an identification and reporting mechanism within the contractor's organization. This will include proposed training of contractor employees to identify and report any conflicts. Other elements to consider are the possible recusal of anyone whose participation in the contract would create a conflict; "firewalls" between certain organizational elements of a conflicted company to prevent the improper transfer of information; and, finally, requiring the company's employees to execute non-disclosure agreements among themselves, the Agency, and the company. A combination of these elements would be an integral part of the overall plan.

If the OCI is discovered after all offers are received but prior to award, consider the following example:

After a review of all offers, the CO determines that award should be made to XYZ Corporation. Unfortunately, credible evidence is presented to support a finding that an OCI exists which would justify withholding award from XYZ Corporation. Prior to making the final decision to withhold award, the CO may notify XYZ Corporation of the determination to withhold award accompanied by the supporting documentation. [1] XYZ is provided a reasonable opportunity to comment on the CO's decision and provide evidence which would support a determination that, notwithstanding the OCI, award should be made to XYZ on the grounds that a mitigation plan will prevent the OCI from affecting contract performance.

Avoidance

Prior to award of a contract, a CO may determine that subsequent contracts will result in an OCI. In these situations, the CO should seek to avoid the future conflict by warning potential bidders that the successful offeror will be unable to compete for follow-on contracts. For instance, a contractor who currently provides systems engineering (SE) or technical assistance (TA) for a Government system cannot be awarded a follow-on contract to supply the system or any of its major components. The FAR also prohibits that same contractor from being a subcontractor to a supplier of that system. The influence SETA contractors have over determining a systems concepts and design could result in biased decision making on the part of the contractor.

In order to facilitate the CO decision prohibiting follow-on contracts, the Maryland Procurement Office Acquisition Supplement, Subpart 309-5, provides a draft determination memorandum. In preparing this memorandum the CO must establish that a substantial OCI likely exists. Anything other than hard facts, such as mere speculation or innuendo, will not suffice. On the other hand, the fact that an incumbent contractor has first hand knowledge related to a requirement does not generally constitute an OCI the Agency must avoid, Optimum Technology, Inc., (B-266339.2. Apr. 16, 1996, 96-1 CPD 188). While an incumbent always has an advantage in a follow-on procurement, GAO has held many times that this is not an unfair competitive advantage. Upon approval by the Chief of N1 to prohibit follow-on contracts due to significant OCI issues, MPOAS Clause 352.209-9003 should be inserted into section H of the solicitation.

Neutralize

When a contractor has information pertaining to a solicitation that results in biased ground rules, the CO may take action to neutralize the situation. In other words, the CO provides all potential bidders with the same information held by the OCI bidder. This solution should be used only to avoid an unfair competitive advantage. Information that an incumbent might posses simply from its familiarity with a program is not necessarily an unfair competitive advantage.

Procedures

Resolution of any OCI is fact specific. Keeping this in mind, the CO should be aware that no two situations will result in a single outcome. For this very reason it is imperative that the CO inform the General Counsel's Office as soon as the OCI is identified. In a protest, a CO's decision to neutralize, mitigate, or avoid an OCI will be reviewed by GAO based upon the reasonableness of the CO's actions. In Cardiocare, a div. of Medtronic, Inc., (1980, 80-1 CPD 237), the GAO held that a procuring activity's decision to disqualify a potential contractor was reasonable and permissible when it determined that impartial assistance or advice could not be provided to the Government by the contractor. Consequently, it is the Procuring Activity's responsibility to balance the Government's competing interests in (1) preventing bias in the performance of contracts and (2) awarding a contract that will best serve the Government. 2 Due to the litigation implications of excluding a bidder, documentation and coordination of a decision to exclude a contractor is critical.

If the OCI is discovered after the submission of proposals, the CO is permitted to withhold award from that particular contractor. However, FAR 9.504(2)(e) requires the CO to notify the apparent successful offeror of this decision and provide the relevant reasons for withholding award. The contractor is then permitted a reasonable opportunity to respond to this decision. Once all the relevant information is obtained by the CO, she may either award to a different contractor, or in limited situations, seek a waiver.

Waiver

If a CO determines that award would be in the best interest of the Government, notwithstanding an OCI, the requirements of FAR 9.503 will kick in. Although a rare occurrence, FAR 9.503 gives the Director or his designee the authority to waive the OCI restrictions when to do so would be in the Government's interest. The FAR restricts delegated waiver authority to the level of head of a contracting activity; therefore, waivers are not within the authority of the CO or Chief of N1. By way of example, consider the following.

XYZ Corporation is the only offeror on a highly specialized and vital Agency program. However, the CO recently discovered credible evidence which supports a determination that an OCI exists with XYZ Corporation. Furthermore, due to the organizational structure of XYZ Corporation the OCI cannot be mitigated. The CO may actually award this contract to XYZ Corporation if the Director, or his designee, waives the OCI rules.

In the above situation, the CO determined that it was in the best interest of the Government to award the contract to XYZ notwithstanding the OCI. The CO must then forward his determination to the Director for consideration. The CO's waiver request and the Director's decision must be included in the contract file.

Subsidiary

It is important to remember that the requirement to identify OCIs extends beyond the specific organizational boundaries of a corporation. Numerous GAO opinions support the proposition that an Agency may exclude a

contractor from competing on the basis of its corporate relationships. Thus, the OCI could apply to parent corporations and its subsidiaries. But keep in mind that a mitigation plan might be used in these situations to permit award to a subsidiary or parent corporation.

In ICF Inc. (B-241372, Feb. 6, 1991, 91-1 CPD 124), the EPA's request for proposals stated that contractors considered response action contractors at the time of contract award would be ineligible to compete due to a potential OCI. The CO based this decision on the statement of work which called for the successful offeror to investigate the efficiency of response action contractors and make recommendations regarding measures to reduce program management costs. The CO determined that ICF was a response action contractor due to the facts that ICF was a wholly owned subsidiary of ACR, and that ACR was the sole stockholder of two other subsidiaries holding response action contracts. Based on the careful consideration given by the CO to the particular facts surrounding ICF's corporate relationship with other response action contractors, the GAO concluded that the CO's decision to disqualify ICF was reasonable and permissible. Furthermore, the CO exercised common sense, good judgment, and sound discretion in the decision making process as required by FAR 9.504.

In conclusion, COs are given responsibility by the FAR to identify and analyze potential conflict of interests. Thus, COs will be the focal point within the Agency for addressing these issues. COs must review all solicitations and existing contracts in order to avoid, mitigate, or neutralize conflicts. In all cases the COs are required to work with the technical element and the General Counsel's Office to determine the appropriate course of action.

Footnotes:

1. The decision to notify the contractor of the OCI may result in breaking the one-step procurement process, FAR 15.306(3).

2. To exclude a potential bidder on the grounds of an OCI is not in itself considered a violation of the Competition in Contracting Act.

OCI Case Summaries

The Town of Fallsburg v. US, 22 Cl. Ct. 633 (March 8, 1991)

EPA withheld federal grant funding to a town for the construction of a wastewater collection and conveyance system to upgrade the existing sewage plant under the Clean Water Act. The town was administered by a town board and town supervisor who served as the project manager. The equipment contract was awarded to a business connected to the town supervisor's family. The town supervisor had no ownership interest but drew a small salary of $100 per week from the business and was included in the business's retirement plan. The grant contemplated separate contracts by the town for portions of the work. The town retained consultants who prepared the specifications for the work and submitted them to the state Department of Environmental Conservation (DEC) that supervised grant awards and contract performance. The town supervisor obtained an opinion from the county attorney that his interest was nominal and that he would not be involved in the procurement, preparation or performance of the contract. The NY state comptroller ruled that while he had a statutory interest, this interest was not prohibited. The town arranged its dealings so that the town supervisor would not vote on matters pertaining to the family business nor be responsible for approving payments to it. The town also had another employee approve the payments to the business. As it turned out, the town supervisor did involve himself in the administration of the contract including the approval of payments, execution of the contractor's indemnification agreement and other matters. The EPA directed that the state withhold payments and initiated a criminal investigation. The town supervisor, contractor and others were indicted for mail fraud and making false and fraudulent statements. The court found that the town supervisor acted as project manager for the town, approved and accelerated payments to his family business.

The court granted EPA's motion for summary judgment, holding that the town negligently failed to avoid a conflict of interest and failed to prohibit the appearance or actuality of favoritism in the award and administration of the contract as required by the grant.

TRW Environmental and Safety Systems, Inc. v US and Bechtel, National, Inc., 18 Cl. Ct. 33 (August 24, 1989).

TRW, an unsuccessful bidder, moved to permanently enjoin DOE from awarding a contract for the systems engineering, development and management of the first nuclear waste repository based upon the alleged Chairman of DOE's Source Selection Evaluation Board's violation of a federal conflict of interest statute 42 USC § 7216.[1] The

[1] Section 606 of Public Law 95 - 91 (42 U.S.C. 7216), provides that for a period of one year after terminating any employment with any energy concern, no supervisory employee shall knowingly participate in any DOE proceeding sin which his former employer is substantially, directly or materially involved.

court granted the permanent injunction because the Chairman of DOE's source selection board violated a federal conflict of interest statute by participating in the procurement within a prohibited period while his former employer was then involved in related DOE proceedings. Sam Rousso was named chairman of the Source Evaluation Board (SEB) on May 1, 1987. He had begun his employment in June 1986 at DOE. Rousso left DOE in November 1987. Prior to leaving Government service, Rousso as SEB Chairman recommended that Bechtel's proposal be selected for negotiations leading to award. The succeeding SEB Chair signed the source selection statement formally selecting Bechtel for negotiations leading to award in December 1988. In a 35-page opinion the Court exhaustively examines every allegation contained in the motion and decided that there was a violation of the federal conflict of interest statute. The court reviewed conflicting legal advice within DOE and various DOE failures to follow its own regulations, such as maintaining a list of "energy concerns" and other matters.

NFK Engineering, Inc. v U.S. and Weidlinger Associates, 9 Cl. Ct. 585 (Feb 27, 1986). A contracting officer (CO) disqualified a bidder on the grounds of unfair competitive advantage through its having hired a former government official that had an alleged conflict of interest in violation of 18 USC § 208. While proposals for a Navy contract were still being considered, the Chairman of the Contract Award Review Panel who served in a dual capacity as the contracting officer's technical representative announced his retirement. Soon thereafter, the Chair falsely asserted that Navy legal counsel had assured him that no conflict of interest would be posed by his employment by one of the bidders. Soon thereafter the bidder hired the Chair as a consultant in a nonexclusive consulting position. The scope of work was drastically changed to accommodate a major increase in work in the Division in which the Chair had worked and the bidder submitted a drastically reduced bid, approximately 33 percent of what it had initially bid resulting in NFK being the low bidder. None of the other offerors reduced their bids by more than 19 percent. The court found that the CO failed to identify the exact specific grounds upon which he based his decision. The Court found that the CO's testimony indicated that he disqualified the bidder both on the appearance of impropriety and his belief that an impropriety had actually occurred. They found that the mere appearance of impropriety was insufficient. The court found that the CO failed to take into consideration "all relevant evidence" indicating that the impropriety had actually occurred, such as, the fact that the amendment which so drastically changed the scope of work was added after the Chair left the Government. The court remanded the case for the consideration of the contracting officer with a specific detailed list of findings for his consideration. The court also noted that the litigation could have been avoided if the CO had provided the plaintiff an opportunity to respond to his findings before he made his decision to disqualify the bidder.

A New Wrinkle With Contractors In The Workplace

Smith and Wesson, two former military officers, entered into federal civil service following their retirement from active duty. Both served as GS-13 supervisory physician assistants at a Government health facility (GHF). As part of their job responsibilities, they wrote statements of work and drafted the specifications for delivery orders and contracts for the procurement of medical supplies for their department within their facility. Neither was required by the duties of their positions to submit financial disclosure statements.

After entering civil service in May 1998, both individuals purchased a limited partnership interest in Medical Supply Business (MSB). MSB provided wholesale medical equipment and supplies to the Government and commercial hospitals. As part of the MSB partnership, each partner would receive distributions based upon sales to GHF. Each received a 12.4% rebate for any supplies purchased by GHF from either MSB. MSB is related to another company called Medical Supplies, Inc. (MSI) through common principals, management and ownership. In December of 1998, Smith initiated a purchase order for equipment and supplies from MSB, ultimately procuring supplies valued in excess of $500,000. In October of 1998, Wesson initiated purchase orders from both MSB and MSI. Both Smith and Wesson received distributions from the MSB based upon its sales.

In April 2002, Smith pled guilty to a one count information charging violation of 18 USC § 208. In May 2002, Wesson pled guilty to a one count information charging violations of 18 USC § 208. In August 2001, Wesson resigned from civil service stating on his Standard Form 450 that he was resigning to accept employment with a local firm. Mr. Wesson has been suspended from Government Contracting pursuant to FAR 9.4. Mr. Smith has been proposed for debarment but has not resigned from civil service nor has any personnel action been proposed by the Government activity.

What programs does your agency have to deal with government personnel who may be engaging in business as contractors or consultants with your own agency or other agencies?

What initiatives or programs does your agency have to alert those engaged in procuring supplies of conflict of interest statutes?

Point Paper On Contracts With Government Employees Or Organizations Owned Or Controlled By Them

1. Purpose. The purpose of this paper is to set forth the legal authorities on this subject.

2. The FAR. Subpart 3.6 of the Federal Acquisition Regulation (FAR) reads as follows.

Subpart 3.6--Contracts with Government Employees or Organizations Owned or Controlled by Them

3.601 Policy.

(a) Except as specified in 3.602, a contracting officer shall not knowingly award a contract to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees. This policy is intended to avoid any conflict of interest that might arise between the employees' interests and their Government duties, and to avoid the appearance of favoritism or preferential treatment by the Government toward its employees.

(b) For purposes of this subpart, special Government employees (as defined in 18 U.S.C. 202) performing services as experts, advisors, or consultants, or as members of advisory committees, are not considered Government employees unless-

(1) The contract arises directly out of the individual's activity as a special Government employee;

(2) In the individual's capacity as a special Government employee, the individual is in a position to influence the award of the contract; or

(3) Another conflict of interest is determined to exist.

3.602 Exceptions.

The agency head, or a designee not below the level of the head of the contracting activity, may authorize an exception to the policy in 3.601 only if there is a most compelling reason to do so, such as when the Government's needs cannot reasonably be otherwise met.

3.603 Responsibilities of the contracting officer.

(a) Before awarding a contract, the contracting officer shall obtain an authorization under 3.602 if-

(1) The contracting officer knows, or has reason to believe, that a prospective contractor is one to which award is otherwise prohibited under 3.601; and

(2) There is a most compelling reason to make an award to that prospective contractor.

(b) The contracting officer shall comply with the requirements and guidance in Subpart 9.5 before awarding a contract to an organization owned or substantially owned or controlled by Government employees.

3. DoD Regulations. There is no provision in the DoD FAR Supplement that supplements FAR Subpart 3.6. Also, the content of FAR Subpart 3.6 is summarized in ¶ 5-402 of the DoD ethics regulation (DoD 5500.7-R, Joint Ethics Regulation, August 30, 1993).

4. Air Force FAR Supplement. Subpart 5303.6 of the Air Force FAR Supplement reads as follows.

SUBPART 5303.6-CONTRACTS WITH GOVERNMENT EMPLOYEES OR ORGANIZATIONS OWNED OR CONTROLLED BY THEM

5303.602 Exceptions. Heads of contracting activities may authorize exceptions to the policy in FAR 3.601. Organizations that are not assigned to the MAJCOMs listed in DFARS Subpart 202.1 shall submit requests to SAF/AQCX for approval.

5. Cases. Here are 28 cases that apply these rules. They are in reverse chronological order. There is one Federal Court of Appeal case and 27 Comptroller General decisions.

Science Pump Corporation, Comp. Gen. Dec. B-255737, 94-1 CPD ¶ 246, March 25, 1994. Individual who was hired by the University of Colorado and who worked at an institute created by a cooperative agreement between the University and the National Oceanic and Atmospheric Administration was not a Federal employee for purposes of FAR 3.601.

Gurley's Inc., Comp. Gen. Dec. B-253852, 93-2 CPD ¶ 123, August 25, 1993. Substantial control found where Air Force husband and wife were president and vice president, respectively, of the bidder and where they substantially controlled the business.

KSR, Inc., Comp. Gen. Dec. B-250160, 93-1 CPD ¶ 37, January 13, 1993. Substantial control was determined where the Army employee was president and one of five equal shareholders in the company.

Marc Industries, Comp. Gen. Dec. B-246528, 92-1 CPD ¶ 273, March 10, 1992. Bureau of Land Management properly determined that an Air Force noncommissioned officer (NCO) substantially controlled the bidder. The NCO represented the contractor in prework conferences, served as the contact for any complaints, and, based on his involvement with the firm, was previously disciplined for violating Air Force conflict of interest regulations.

HH & K Builders, Inc., Comp. Gen. Dec. B-238095, 90-1 CPD ¶ 219, February 23, 1990. Award was not disturbed where, although the sole owner's husband was a Government

employee, the Air Force had determined sufficient separation between his wife's ownership and his official Air Force duties.

Wildcard Associates, Comp. Gen. Dec. B-235000, 68 Comp. Gen. 563, 89-2 CPD ¶ 74, July 24, 1989. Firm had sufficient interest to file protest, even though two of its partners were Government employees. Both partners were eligible to retire from Federal service and asserted that they would do so if the firm was awarded the contract.

John Peeples, Comp. Gen. Dec. B-233167, 89-1 CPD ¶ 178, February 21, 1989. Navy improperly rejected bid bond of firm guaranteed by individual who happened to be a Government employee.

Tamara L. Wolf, Comp. Gen. Dec. B-233317, 68 Comp. Gen. 212, 89-1 CPD ¶ 99, January 31, 1989. Protest dismissed since bidder, a Government employee, was prohibited from receiving the contract under FAR 3.601.

Speakman Co. v. Weinberger, 837 F.2d 1171 (D.C. Cir. 1988). Appeals Court, in reversing District Court, held that the award of a Navy contract to a former Government employee was proper where the former employee terminated his Government employment prior to the contract award date.

Dynamic Science, Inc., Comp. Gen. Dec. B-228743, 87-2 CPD ¶ 196, August 21, 1987. The term "Government employee" in FAR 3.601 applies only to Federal employees.

Friends of the Waterfront, Inc., Comp. Gen. Dec. B-225378, 66 Comp. Gen. 190, 87-1 CPD ¶ 16, January 6, 1987. The Army Corps of Engineers properly disqualified a firm from competing for the contract since the firm's co-founder and officer was a Government employee who had signed the firm's bid.

Big Sky Resource Analysts, Comp. Gen. Dec. B-224888, 87-1 CPD ¶ 9, January 5, 1987. Award to former U.S. Forest Service seasonal employee upheld where former employee terminated his Government employment one day prior to the contract being awarded.

Revet Environment & Analytical Laboratories, Inc., Comp. Gen. Dec. B-221002.2, 86-2 CPD ¶ 102, July 24, 1986. Environmental Protection Agency (EPA) properly disqualified firm from bidding on contract. Firm was owned by an EPA employee and, even though he later divested himself, there was still the appearance of a conflict of interest.

Cooley Container Corporation, Comp. Gen. Dec. B-220801, 86-1 CPD ¶ 114, January 31, 1986. The Army properly disqualified a firm from bidding on the contract. Husband, an Air Force employee, was the sole incorporator of the firm.

Mesa, Inc., Comp. Gen. Dec. B-220657, 85-2 CPD ¶ 724, December 27, 1985. FAR 3.601 does not prohibit a potential bidder from employing a Government employee.

Defense Forecasts, Inc., Comp. Gen. Dec. B-219666, 65 Comp. Gen. 87, 85-2 CPD ¶ 629, December 5, 1985. Arms Control and Disarmament Agency (ACDA) properly determined that there was the appearance of a conflict of interest when the firm proposed to use, as a consultant, a special Government employee of ACDA.

Ernaco, Inc., Comp. Gen. Dec. B-218106, 85-1 CPD ¶ 592, May 23, 1985. Environmental Protection Agency (EPA) properly disqualified firm on basis that its majority shareholder was also a special Government employee who had been retained by the EPA to provide consulting services.

J. Allen Grafton, Comp. Gen. Dec. B-212986, 84-1 CPD ¶ 263, March 5, 1984. The U.S. Forest Service unreasonably rejected a bid from the son of an employee, where the employee had no responsibility for the contract and where there was no indication that the employee disclosed confidential agency information to his son.

Joann Flora, Comp. Gen. Dec. B-212776, 83-2 CPD ¶ 520, October 31, 1983. Disqualification to purchase used government vehicles by unmarried woman who lived with Department of Agriculture employee as spouse was upheld. Agency regulations prohibited the sale of surplus property to employees or members of their household and the employee was responsible for determining whether property should be repaired or condemned.

International Alliance of Sports Officials, Comp. Gen. Dec. B-210172, 83-2 CPD ¶ 328, September 15, 1983. Agency did not abuse its discretion in accepting low bid of organization owned or controlled by Government employees where other bid was 25 percent higher.

Heidi Holley, Comp. Gen. Dec. B-211746, 83-2 CPD ¶ 241, August 23, 1983. The U.S. Forest Service properly rejected the bid of a Forest Service employee's wife where agency regulations generally prohibited awarding contracts to family members and where the employee would be supervising the performance of the awarded contract.

Electronics West, Inc., Comp. Gen. Dec. B-209720, 83-2 CPD ¶ 127, July 26, 1983. Disqualification of firm for Army contract was appropriate even though the Government employee's status with the firm changed from president to treasurer.

Sterling Medical Associates, Comp. Gen. Dec. B-209493, 83-1 CPD ¶ 215, March 1, 1983. Navy's award of contract for radiology services to Veteran's Administration (VA) doctor upheld where Navy had no knowledge of doctor's status at time of award and where doctor terminated his employment with VA thereafter.

National Service Corporation, Comp. Gen. Dec. B-205629, 82-2 CPD ¶ 76, July 26, 1982. Held that Government employee had no substantial ownership or control of the firm. The partnership, which originally owned the business, was dissolved and the firm

was incorporated. The Government employee owned no stock in the firm and was employed only part-time as a bookkeeper.

Elogene Thurman, Comp. Gen. Dec. B-206325, 82-1 CPD ¶ 487, May 24, 1982. General Services Administration properly disqualified wife of Government employee from bidding on contract since her husband, in fact, operated the business.

American Truss & Mfg. Corp., Comp. Gen. Dec. B-205962, 82-1 CPD ¶ 477, May 18, 1982. Army properly refused to award contract to firm where a Government employee owned 50 percent of the firm's stock and was its secretary/treasurer while his wife owned the remaining stock and was the firm's president.

Valiant Security Agency, Comp. Gen. Dec. B-205087, 61 Comp. Gen. 65, 81-2 CPD ¶ 367, October 29, 1981, reconsideration denied, B-205087.2, 81-2 CPD ¶ 501, December 28, 1981. Refusal to award contract to firm owned by Government employee upheld, even where firm was low bidder.

Biosystems Analysis, Inc., Comp. Gen. Dec. B-198846, 80-2 CPD ¶ 149, August 25, 1980. Award of contract by U.S. Forest Service to firm, one of whose principals was employed by the U.S. Fish and Wildlife Service, was upheld. At time of award, U.S. Forest Service had no knowledge that one of the principals was a Government employee and no misrepresentations were made by the awardee.

6. Nonappropriated funds ("NAFs"). Air Force Manual 64-302, Nonappropriated Fund (NAF) Contracting Procedures, 3 November 2000, para. 11.11 states:

> 11.11. Contracts with Government Employees. Contracts or lease agreements are authorized with military personnel, government employees, or business organizations substantially owned or controlled by government employees, when such contracts or leases are funded solely with NAFs. However, legal review is required to the execution of any such contracts or agreements.

7. Treatise. The subject of contracts awarded to government employees (or organizations owned or controlled by government employees) is discussed in Cibinic and Nash, Formation of Government Contracts, third edition, 1998, pages 429-432.

Prepared by Lieutenant Colonel Timothy S. Sinnott, USAFR, and Mr. Mark F. Stone
Directorate of Ethics and Fraud Remedies
Air Force Materiel Command Law Office
Wright-Patterson Air Force Base, Ohio
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Procurement Integrity for Contractors

Presented by:
Lisa Lander
10 ABW/JA
USAF Academy
333-3940

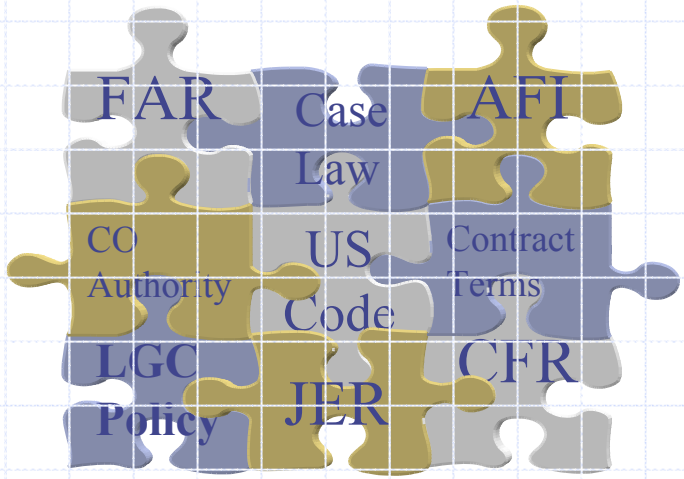
This presentation is not intended to provide or substitute for independent legal advice.

Introduction

- Subject: Address Contractor
  - exposure to and use of **procurement sensitive information** and
  - Avoidance of **conflicts of interest**
- Contractor should be familiar with rules, regulations and laws on these subjects
- Contractor obligations under contract with the Government require exposure to procurement sensitive information

Overview

- Procurement sensitive information must be protected from inappropriate disclosure and use
- Laws, regulations and rules require specific handling procedures for this information



US Code: Procurement Integrity Act

- Office of Federal Procurement Policy Act (the Procurement Integrity Act (41 U.S.C.423) referred to as "the Act"
- Four basic provisions:
  - A ban on disclosing procurement information
  - A ban on obtaining procurement information
  - A requirement for agency officials to report employment contacts by or with a competing contractor
  - A one-year ban for certain government personnel on accepting compensation from the contractor

US Code: Procurement Integrity Act

- Ban on Disclosing Procurement Information
  - Act prohibits disclosure of "contractor bid or proposal information" and "source selection information"
  - Ban applies to:
    - Current Federal employees
    - Former Federal employees
    - Individuals (such as contractor employees) who are currently advising the government regarding the procurement
    - Individuals (such as contractor employees) who have advised the government regarding the procurement but are no longer doing so

US Code: Procurement Integrity Act

- Ban on Obtaining Procurement Information
  - Individuals are prohibited from knowingly obtaining "contractor bid or proposal information" or "source selection information" before the award of the contract to which such information relates, other than as provided by law
  - Ban applies to everyone (including Federal employees and contractor personnel)

FAR: Procurement Integrity Act

- Ban on Disclosing or Obtaining Procurement Information (FAR 3.104-3)
  - "Contractor bid or proposal information" means any information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly (FAR 3.104-1 – Definitions)
  - Examples: Cost or pricing data; Indirect costs and direct labor rates; Proprietary information; Information marked by the contractor as "contractor bid or proposal information" in accordance with applicable law or regulation

FAR: Procurement Integrity Act

- Ban on Disclosing or Obtaining Procurement Information (FAR 3.104-3)
  - "Source selection information" means any information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly (FAR 2.101 – Definitions)
  - Examples: Bid or proposed prices submitted; Source selection plans; Technical evaluation plans; Technical or cost/price evaluations or proposals; Competitive range determinations or other rankings; Reports and evaluations of source selection panels, boards, or advisory councils

FAR: Procurement Integrity Act

- Ban on Disclosing or Obtaining Procurement Information (FAR 3.104-3)
  - "Source selection information" most broadly includes *other information marked as "Source Selection Information - See FAR 2.101 and 3.104" based on a case-by-case determination by the head of the agency or the contracting officer, that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates* (FAR 2.101 – Definitions)

FAR: Procurement Integrity Act

- Disclosure, Protection, and Marking of Contractor Bid or Proposal Information and Source Selection Information (FAR 3.104-4)
  - Except as specifically provided for in this subsection, no person or other entity may disclose contractor bid or proposal information or source selection information to any person other than a person authorized, in accordance with applicable agency regulations or procedures, by agency head or the contracting officer to receive such information

FAR: Procurement Integrity Act

- FAR 3.104-4, cont'd
  - Individuals unsure if particular information is source selection information, as defined in 2.101, should consult with agency officials as necessary
  - Individuals responsible for preparing material that may be source selection information as described at FAR 2.101 (10) must mark the cover page and each page that the individual believes contains source selection information with the legend *"Source Selection Information -- See FAR 2.101 and 3.104"*

FAR: Procurement Integrity Act

- FAR 3.104-4, cont'd
  - Contractor bid or proposal information and source selection information must be protected from unauthorized disclosure in accordance with 14.401, 15.207, applicable law, and agency regulations
- FAR 14.401 -- Receipt and Safeguarding of Bids
- FAR 15.207 -- Handling Proposals and Information

FAR: Organizational Conflict of Interest

- FAR 9.502 -- Applicability
  - An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required

FAR: Organizational Conflict of Interest

- FAR 9.505 -- General Rules
  - The two underlying principles are –
    - Preventing the existence of conflicting roles that might bias a contractor's judgment; and
    - Preventing unfair competitive advantage
  - An unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses
    - Proprietary information that was obtained from a Government official without proper authorization; or
    - Source selection information that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract

FAR: Organizational Conflict of Interest

- FAR 9.505-1 -- Providing Systems Engineering and Technical Direction
  - Prohibits a Contractor from providing both any systems engineering or technical directions and the system itself
- FAR 9.505-2 -- Preparing Specifications or Work Statements
  - Prohibits a Contractor from providing both an item or services and the corresponding
    - Nondevelopmental item specifications; or
    - System or services work statement, unless it is the sole source or did not solely prepare the SOW

FAR: Organizational Conflict of Interest

- FAR 9.505-3 -- Providing Evaluation Services
  - Prohibits a contractor from evaluating its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interests
- FAR 9.505-4 -- Obtaining Access to Proprietary Information
  - Contractors who perform advisory and assistance services for the Government must agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary *and refrain from using the information for any purpose other than that for which it was furnished*

FAR: Contract Clauses for Compliance

- FAR 52.203-8 -- Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity
  - Government may rescind the contract (with costs) for contractor's or its employee's violation of the PIA
- FAR 52.203-10 -- Price or Fee Adjustment for Illegal or Improper Activity
  - Government may reduce the contract fee for contractor's or its employee's violation of the PIA

USC: Individual Conflict of Interest

- 18 USC §208--Criminal Statute
  - Government Employee may not participate personally & substantially (e.g., make a decision, give advice, make a recommendation) in any government matter that would affect his financial interests or those imputed to him
- 10 ABW/LGC Policy is to use same standard as a guide to test for conflicts which may arise between a Contractor employee and that employee's function for the Government under the Government contract

CFR: Individual Conflicts of Interest

- Appearance of a Conflict of Interest (5 CFR 2635.502; JER)
- Personal and Business Relationships: Air Force military members and civilian employees are prohibited by 5 CFR 2635.502, which is incorporated in the Joint Ethics Regulation as a punitive regulatory provision, from participating in any official matter when a reasonable person with knowledge of the relevant facts would question their impartiality

CFR: Individual Conflicts of Interest

- 5 CFR 2635.502 & JER provide:

  "[w]here an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee . .

CFR: Individual Conflict of Interest

- 10 ABW/LGC Policy is to use same standard as a guide to test for an appearance of a conflict which may arise between a Contractor employee and that employee's function for the Government under the Government contract

Summary

- While most procurement integrity statutes and regulations apply to Government personnel, the FAR and 10 ABW/LGC Policy provide for several applications to Contractors
- When issues arise, address them to the Contracting Officer promptly
- Government and Contractor cooperation is the best way to resolve potential procurement integrity issues

Where to Get More Information

- Contractor counsel on legal matters
- FAR and contract provisions
- Contracting Officer directions

EMPLOYEE CONFIDENTIALLY
NON-DISCLOSURE OF NON-PUBLIC INFORMATION AND
CONFLICT OF INTEREST

I, _____, the undersigned, employed by _____, supporting requirements with the Defense Energy Support Center (DESC), under Contract number _____, certify that I **SHALL:**

- NOT SEEK access to nonpublic information beyond what is required for performance of the contract. Nonpublic information is information that I gain in performance under this contract and that I know or reasonably should know has not been made available to the general public. It includes information that I know or reasonably should know: (1) is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute, Executive order or regulation; (2) is designated as confidential by DESC or any other government agency; or (3) has not actually been disseminated to the general public and is not authorized to be made available to the public on request,

- ENSURE that my identity as a contractor employee is known when seeking access to and receiving nonpublic information from Government employees, members of the general public or other contractors/offerors,

- NOT USE or disclose such information for any purpose other than providing contract support services under the contract or disclose the information for any personal or other commercial purpose,

- ADVISE the Contracting Officer in writing as soon as possible if I become aware of any improper release or disclosure of nonpublic information,

- AGREE to return any nonpublic information given to me during contract performance, including all copies, upon completion of each assignment, and

- RECOGNIZE that release or disclosure of nonpublic information is in violation of this Agreement and that contractual actions, as well as civil or criminal remedies authorized by law, are applicable to both me and the Contractor for unauthorized use or release of nonpublic information.

I recognize that the performance under this contract may present me with potential conflicts of interest. A "conflict of interest" includes, but is not limited to: (1) participating personally and substantially in a government procurement, contract, issue, litigation or other matter that will affect my financial interests or those my spouse, minor child, general partner, an organization in which I serve as an officer, director, trustee, general partner or employee, or a person with whom I am

negotiating for or have an arrangement concerning prospective employment, or (2) involvement in a government procurement, contract, issue, litigation or other matter that might affect the financial interests of a person who is a member of my household or with whom I have a close personal relationship, a person for whom my spouse, parent or dependent child serves as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee, any person for whom I have within the last year served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee, or any organization in which I am an active participant.

I agree that I will not engage in any personal, business or professional activity, or receive or retain any financial interest, which places me in a position of conflict between those interests and my duties or responsibilities related to the performance of this contract.

I acknowledge and agree that I must disclose potential conflicts of interest by providing a written statement of my affiliations and financial interests to the Contracting Officer upon request, and to avoid potential conflicts of interest when identified.

Failure to submit the statement described above or a statement of my affiliations and financial interests upon request shall preclude my working on the subject contract.

SIGNED:_____ DATE:_____

COMPETITIVE SOURCING CERTIFICATE: CONTRACTOR EMPLOYEE

Competitive Sourcing Project Name: Contract Oversight and Support Functions under the A-76 Competitive Sourcing Contract between Contractor, Inc. and USAFA

Name: _____

Job Title:_____ **Employer:** _____

Acknowledgment

1. I acknowledge that, due to my position under contract to the USAFA, I may have involvement in current and future competitive sourcing initiatives. I am aware that unauthorized disclosure of competitive sourcing or proprietary information could damage the integrity of this process, and that the transmission or revelation of such information to unauthorized persons could subject me and my employer to prosecution under the Procurement Integrity Laws or under other applicable laws.

2. I do solemnly swear or affirm that I will not divulge, publish, or reveal by word, conduct, or any other means, such information or knowledge related to competitive sourcing actions, except as necessary to do so in the performance of my contract duties and as directed by the appropriate government official with authority over my employer's contract with USAFA. Any such revelation of information shall be made in accordance with the laws of the United States, unless specifically authorized in writing in each and every case by a duly authorized representative of the United States Government. I take this obligation freely, without any mental reservation or purpose of evasion and in the absence of duress. Further, I acknowledge that these obligations arise in part from the contract requirements imposed on my position by the contract between USAFA and my employer.

3. I acknowledge that the information I receive will be given only to persons specifically granted access to the competitive sourcing information and may not be further divulged without specific prior written approval from an authorized individual.

4. If, at any time during the competitive sourcing process, my participation might result in a real, apparent, possible, or potential conflict of interest, I will immediately report the circumstances to my employer and the Contracting Officer.

SIGNATURE:_____ DATE:_____

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 10TH AIR BASE WING

USAF ACADEMY. COLORADO 80840-2240

June 2002

MEMORANDUM FOR: Contractor, INC.
[Address]

FROM: USAFA

SUBJECT: Contract No ____ , Conflict of Interest

The purpose of this letter is to address the conflict of interest rule at FAR 9.505 and how it applies to Contract No. _____ between the US Air Force Academy and Contractor, Inc.

Part of the financial management that Contractor must conduct on a regular basis requires the use of the ABSS system for processing Form 9's etc. Because of Contractor's access to the ABSS system, Contractor has the capability to see financial planning documents entered in to this system for all procurements. This information is considered source selection sensitive in developing the government's procurement strategy. We trust that Contractor uses ABSS only for the management of this particular contract, however, the mere appearance of conflict of interest dictates that the Government place Contractor on notice regarding this situation. As a result of Contractor's necessary exposure to source selection information, Contractor must be disqualified as a competitor in all upcoming USAFA contract actions entered into ABSS for the duration of this contract. Please be advised that a modification to the contract is forthcoming which will state the nature of potential conflict as seen by the contracting officer, and state the nature of the proposed restraint upon future contractor activities.

In addition, under your contract, you are required to participate in procurements involving technical support (i.e. developing the government estimate, specifications/SOW, etc.), technical evaluations, and proposal evaluations. During these procurements, your designated personnel will be required to sign procurement integrity certificates.

Sincerely

Contracting Officer

A-76 NON-DISCLOSURE AND CONFLICT OF INTEREST
(Contractor Employee)

NAME: _____

JOB TITLE: _____

COMPANY NAME:_____

A-76 STUDY(IES): _____

DLA SPONSOR:_____
(i.e., DDC, DRMS or J-3)

AFFILIATION to the A-76 Study (Circle One): MEO / PWS / IRO / Other: _____

1. I acknowledge that my contract responsibilities cause me to have access to an A-76 study. I am aware that unauthorized disclosure of source selection or proposal information (including the Government's management plan) could damage the integrity of this procurement and that the transmission or revelation of such information to unauthorized persons could subject me to prosecution under the Procurement Integrity Laws or under other applicable laws.

2. I will not divulge, publish, or reveal by word, conduct, or any other means, such information or knowledge, except as necessary to do so in the performance of my official duties related to this study and in accordance with the laws of the United States, unless specifically authorized in writing in each and every case by a duly authorized representative of the United States Government.

3. I acknowledge that the information I receive will be given only to persons specifically granted access to the procurement/proposal/source selection sensitive information and may not be further divulged without specific prior written approval from an authorized individual.

4. If, at any time during this A-76 study, my participation might result in a real, apparent, possible, or potential conflict of interest, I will immediately report the circumstances to the appropriate authorized individual; i.e., Contracting Officer, local Counsel, or Source Selection Authority.

SIGNATURE: _____ **DATE:** _____

RETURN TO
DEFENSE DISTRIBUTION CENTER
A-76 PROJECT OFFICE, DDC CA

PHONE *FAX*

HOLIDAY GUIDANCE

ON

PARTYING WITH CONTRACTORS AND SUPERVISORS

Prepared by
DoD Standards of Conduct Office, Office of General Counsel
December 7, 1999

It's holiday time, and many offices hold parties and receptions involving food, drink, and even gifts. Such activities among Federal employees are well established, but the inclusion of contractor employees, who are not Federal employees yet who work in your organization, adds some new considerations. The guidance below addresses these issues.

THE RULES (5 C.F.R. 2635. 201 - 304)

The following restrictions frequently come into play with holiday parties. (These are not all of the rules and exceptions, only the most applicable ones for holiday events.)

Gifts From Contractors:

1. Federal employees may not accept gifts from contractors or contractor personnel.

    a. Exception #1: Gifts (other than cash) not exceeding $20 may be accepted as long as the employee has not accepted other gifts from the contractor that, when accumulated, exceed $50 for the year.

    b. Exception #2: Federal employees may accept gifts from a contractor employee that are based on a bona fide personal relationship. (Such personal gifts are actually paid for by the contractor employee.)

    c. Exception #3: Federal employees may generally attend a contractor's open-house or reception if it is a widely-attended gathering, and the employee's supervisor determines that it is in the agency's interest that the employee attends.

    d. Exception #4: Federal employees may accept invitations (even from contractors) that are open to the public, all Government employees, or all military personnel.

    e. Exception #5: Federal employees may accept invitations offered to a group or class that is not related to Government employment.

Gifts Between Federal Employees:

1. Superiors may not accept gifts from subordinates or employees who receive less pay

    a. Exception #1: On an occasional basis (like during the holidays) superiors may accept gifts (other than cash) of $10 or less from a subordinate.

b. Exception #2: Superiors can accept food and refreshments shared in the office.

c. Exception #3: Superiors may accept personal hospitality in the residence of a subordinate of the type and value customarily given on such an occasion.

d. Exception #4: Superiors may accept gifts of the type and value customarily given for personal hospitality at their residences.

(Please note, there are no restrictions on gifts given to peers or subordinates)

Rules Applicable to Contractor Employees:

1. Many contractors have rules of ethics or business practices that are similar to the Federal rules. Take these rules into consideration before offering contractor employees gifts or opportunities they may not be able to accept.

APPLICATION OF THE RULES:

1. **Office Party (non-duty time):** Your office is having a holiday party during the non-duty lunch hour or after work and asks each person attending to pay $5 to cover refreshments and to bring a pot luck dish or dessert. Contractor employees may attend, pay $5, and bring food because these contributions are not considered to be gifts, but a fair share contribution to the refreshments. **Remember**, contributions must be voluntary, so soliciting must be done with care to ensure there is no pressure. Also, ensure this is non-duty time for the contractor employees as well.

2. **Office Party (duty time):** What about a party that cuts into duty hours? The government usually may not reimburse a contractor for its employees' morale and welfare expenses. The contractor has to decide whether to let its employees attend and forego payment for their time, or insist that they continue to work. If contractor employees are allowed to attend, the contractor must also decide whether it would pay its employees for that time, even though it wouldn't be reimbursed by the government. The contractor does not have to pay its employees for that time. Consult the contracting officer and ethics counselor before inviting contractor employees to a function during their duty hours.

3. **Gift to Supervisor:** Your office wants to give the office supervisor a gift. However, you can't solicit other employees for contributions to a group gift at a recurring occasion such as the holidays. This goes double for contractor employees. You can't ask them to contribute any cash toward a gift, as it is considered soliciting a gift from a prohibited source. Even if the contractor employees volunteer to contribute cash, it may not be accepted because the $20 exception does not apply to cash.

4. **Exchange of Gifts:** Your office, including the contractor employees, wants to exchange gifts at the party. If gifts are chosen at random or traded, there are no monetary limits (except common sense) because the purchaser of the gift does not know who will eventually receive it. Gift exchanges in which employees purchase gifts for other employees whose names they drew at random, are more troublesome. Where an employee may buy a gift for a superior, the $10 limit is prudent. Where contractor personnel are involved, a $20 limit eliminates any concerns. Some organizations consider such a gift exchange to be exchanges of items of equivalent value, and that everyone participating is paying market value for the items, so no one is receiving a gift. As such, the suggested monetary limits above, are not applicable.

5. **Private Parties (Federal Employee):** One of your government co-workers is having a party at his house and has invited the whole office, including the contractor employees. This is ok because a gift of food and refreshments to a contractor employee does not violate government ethics rules. He may, however, want to check with his contractor's rules before accepting since many contractors have similar ethics rules. If the contractor employee brings a gift to the host as thanks for the hospitality, it may not exceed $20. If it is more, but is immediately edible, the host could accept it on behalf of all the guests and share it.

6. **Private Parties (Contractor Employee):** If a contractor employee is having a party and invites government employees, normally the government employee must decline, since the food, drink, and entertainment is a gift from a prohibited source. Several exceptions may permit attendance, however. Under the $20 rule, if the average cost per guest does not exceed $20, the government employee may accept. (However, if the cost per guest is $40, the "I won't eat more than $20 worth of food." defense will not work.) Also, the government employee may accept if the invitation is based on a bona fide personal relationship with the contractor employee. Finally, if the party qualifies as a widely-attended gathering (involving a large number of persons representing a diversity of views) and the employee's supervisor determines that it is in the agency's interest for the employee to attend, the employee may enjoy the food, drink, and entertainment. Government employees who desire to take a gift to show their appreciation for the hospitality should consult with the contractor employee to determine if he or she may accept such a gift in accordance with the contractor's rules of ethics.

7. **Private Parties (Contractor-sponsored):** If the contractor is sponsoring an employee's party or open-house, and you are invited by the contractor, you may not attend unless one of the exceptions in paragraph #6, above, apply.

Have a wonderful holiday season. Please remember that this guidance only highlights common questions, and does not cover every situation. If you are unsure, contact your ethics counselor.

Melinda J. Loftin

Melinda J. Loftin is an Associate General Counsel and a Deputy Designated Agency Ethics Official for the Department of the Air Force where she provides advice and counsel on a broad range of ethics matters to the Secretary of the Air Force and his staff. In 2001, Ms. Loftin completed an assignment to the Office of Counsel to the President at the White House where she worked on nominations and documents for White House appointees.

Ms. Loftin worked for the Department of the Army for 16 years in a broad range of legal disciplines. She served as a congressional fellow on the Senate Oversight of Government Management Subcommittee. Ms. Loftin has taught at the U.S. Army Judge Advocate General School. She was a Senior Executive Fellow at the Kennedy School of Government and is a recent graduate of the Federal Executive Institute.

PRIMARY AREAS OF PRACTICE:

- Ethics, Travel, Administrative Law
- General Officer and Political Nominations
- Public Affairs & Gifts to the Air Force

EDUCATION:

- B.A. (Business Administration and Political Science), Adrian College, Adrian, MI, 1977
- J.D., Detroit College of Law at Michigan State University, Lansing, MI, 1981

PROFESSIONAL EXPERIENCE:

- General Attorney, United States Army Tank-Automotive Command, Warren, MI (1981-1986) Law Clerk (1980-1981)
- Chief Counsel, United States Army Natick Research Development and Engineering Center, Natick, MA (1990-1993) General Attorney (1986-1990)
- Professional Staff Member/Counsel, United States Senate, Oversight of Government Management Subcommittee, Washington D.C. (1989-1990)
- Associate Command Counsel, United States Army Materiel Command, Alexandria, VA (1993-1996)
- Ethics Advisor, Office of Counsel to the President, The White House, Washington D.C. (2001)
- Associate General Counsel (Fiscal, Ethics & Civilian Personnel) Department of the Air Force, Washington D.C. (1996-present)

Christine L. Poston

Undergraduate: BA, Political Science, Furman University, Greenville, SC, May 1975, Magna Cum Laude Graduate, Phi Beta Kappa.

Law School: JD, 1978, University of South Carolina School of Law, Columbia, SC.

Bar Admissions: South Carolina Bar, November 1978; District of South Carolina, December 1978.

DLA Tenure: May 1984-present.

Fraud Counsel, Defense Energy Supply Center (DESC), June 2001 - present. Implement & direct Fraud program for $ 3 billion program for the worldwide procurement of petroleum, coal, electricity, natural gas & alternative energy. Served dual capacity with DSCR-A position below until February 2002. Serve as Alternate Ethics Counsel.

Chief Counsel, DLA Aluminum Products Quality Assurance Group (DSCR-A), Office of General Counsel, DLA Headquarters w/ duty at Defense Supply Center Richmond, (Detail) September 2000 – Feb 2002. Provide legal advice & counsel involving fraud of "down-tier" metal heat-treater of aluminum parts furnished by DoD contractors for aerospace & other DoD applications.

DLA Associate General Counsel for Contracting Integrity, Office of General Counsel (Detail) November 1998 – December 1999. Served one-year detail as a principal assistant to DLA Debarring Official.

Fraud & Ethics Counsel, Defense Energy Supply Center (DESC), February 1990 - present. Implemented & directed Fraud & Ethics program for $ 3 billion program for the worldwide procurement of petroleum, coal & natural gas.

Special Assistant U.S. Attorney, Civil Division, (ED PA) November 1988 - February 1990. Represented the United States in trials of defense procurement fraud, Title VII, tort, illegal food stamp use, illegal dispensation of drugs & other civil matters.

Chief, Clothing & Textile (C&T) Fraud Remedies Unit, **Defense Personnel Support Center (DPSC), Philadelphia, PA**, September 1987 - November 1988. Coordinated administrative, civil & criminal remedies for major bid collusion & bribery conspiracy involving Government personnel & over 30 C&T contractors. .

Staff Attorney, C&T Fraud Remedies Unit, April 1987 - September 1987. Provided advice regarding the disciplinary actions against Government employees who accepted bribes from C&T contractors.

Attorney Advisor, **Defense Industrial Supply Center (DISC),** Acquisition Team & Fraud Team, October 85 - April 87.

Counsel, Defense Depot Mechanicsburg (DDMP), PA, May 84 - October 1985.

DLA Special Assignments:

Chair, Debarment, Suspension, & Business Ethics Committee, Defense Acquisition Regulation (DAR) Council, July 1996 - present. This committee drafts & reviews acquisition & ethics regulations for the Federal Acquisition & Defense Federal Acquisition Regulations, including regulations such as the "Contractor Responsibility Rule."

Chair, Interagency Suspension & Debarment Subcommittee for Lead Agency & Interagency Coordination in Suspension & Debarment, in 2001 and 2002.

DLA Member, Interagency Council for Suspension & Debarment, July 1996 – present. Oct 2002 to March 2003, served as DLA member subcommittee for Terrorist Listings for EPLS.

OGE Conference panel member for *Procurement Integrity* in 2000 and *Contractors in the Workplace* in 2001

Prior Legal Experience U.S. Army Judge Advocate General's Corps.
Reservist, 1986 – February 1994: **Active duty**, December 1978 - May 1984.

MATT RERES

Mr. Reres is the Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Pentagon, Department of the Army. He serves as the Army's Alternate Designated Agency Ethics Official, exercising oversight of the Army's Standards of Conduct Office, and sharing equal responsibility with the Army General Counsel for the Army's worldwide ethics program. In this capacity, he is the final legal authority within the Army for all ethics matters in the following subject areas: standards of ethical conduct; activities with non-federal entities; outside speaking, teaching, and writing; conflicts of interest; political activities; private organizations and non-federal entities; financial and employment disclosure; post-government employment; gifts; use of government resources, contact with Defense contractors; procurement integrity; and ethics training. He also serves as the final legal authority within the Army for fiscal law matters in the following subject areas: Anti-deficiency Act violations; Authorization and Appropriation Acts; reprogrammings and transfers; budget formulation, submission, and execution; contingency funds; military construction; the planning, programming, budgeting, and execution system; continuing resolutions; and all other financial management matters. Mr. Reres is responsible for presenting all ethics and fiscal positions to the Congress, the Office of Government Ethics, the Office of the Secretary of Defense, the Military Departments, other federal agencies, and the private sector.

Prior to his civilian career, Mr. Reres served on active duty for twelve years as an Army Judge Advocate officer. During that time, he acted as a trial and defense counsel, contract attorney, and as an administrative law officer. After more than 31 years of military duty, he retired as a Colonel from the Army Reserve component, serving his last 17 years as a commander of a Judge Advocate General Detachment supporting the National Guard Bureau. Among his many military decorations, Mr. Reres has received the Legion of Merit, the Army Meritorious Service Medal, the Army Commendation Medal, the Army Achievement Medal, and the Good Conduct Medal.

Mr. Reres received BA and JD degrees from Creighton University, Omaha, Nebraska. He is admitted to the Nebraska Bar, U.S. Court of Appeals for the Armed Forces, Tax Court, Court of Federal Claims, Customs Court, and the Supreme Court of the United States. He is a member of the Senior Executive Service, the American and Federal Bar Associations, and is an Honorary Member, Staff and Faculty, The Judge Advocate General's School. He is a member of the American Society of Military Comptrollers for which he served as the Society's General Counsel for ten years. He is also a member and Past Grand Knight of his parish council of the Knights of Columbus and he has served for twenty-five years as an adjunct associate professor on the faculty of Northern Virginia Community College. Among his civilian awards, Mr. Reres has received Presidential Rank and Performance Awards both as a Distinguished and a Meritorious Executive as well as both the Secretary of the Army's Exceptional and Meritorious Civilian Service Medals.

Allison C. George

Allison George is an Associate General Counsel at the U.S. Office of Government Ethics. Prior to joining OGE, she was Senior Counsel at the Washington, D.C. office of Foley & Lardner, where she counseled multi-national corporations and organizations on foreign business practices, anti-corruption initiatives, and campaign finance, lobbying and ethics laws. While in private practice, Ms. George specialized in developing and implementing global corporate compliance programs, as well as in conducting substantial internal investigations concerning alleged violations of the Foreign Corrupt Practices Act, improper payments, kickbacks, fraud and corruption. She has also represented clients in Congressional investigations, and in civil and criminal federal enforcement actions. Ms. George received her B.A. from Yale University and her J.D. from the Duke University School of Law.